1795. unneceſſary, however, to declare, or to form, at this time, any concluſive opinion, on the queſtion which has been ſo much agitated, reſpecting the evidence required by the 9th article of the Conſular Convention.

The Rule diſcharged.

PENHALLOW, *et al. verſus* DOANE'S *Adminiſtrators.*

THIS was a Writ of Error, directed to the Circuit Court for the Diſtrict of *New-Hampſhire*. The caſe was argued from the 6th to the 17th of *February*; the Attorney General of the *United States*, *(Bradford)* and *Ingerſoll*, being Counſel for the Plaintiffs in error; and *Dexter*, *Tilghman* and *Lewis*, being Counſel for the Defendants in error.

The Caſe, reduced to an hiſtorical narrative, by Judge *Paterſon*, in delivering his opinion, exhibits theſe features:

"This cauſe has been much obſcured by the irregularity of the pleadings, which preſent a medley of procedure, partly according to the common, and partly according to the civil, law. We muſt endeavour to extract a ſtate of the caſe from the Record, Documents, and Acts, which have been exhibited.

It appears, that on the 25th of *November*, 1775 *(1 Jour. Congreſs*, 259*)* Congreſs paſſed a ſeries of Reſolutions reſpecting captures. Theſe Reſolutions are as follow:

"Whereas it appears from undoubted information, that many veſſels, which had cleared at the reſpective Cuſtom-houſes "in theſe Colonies, agreeable to the regulations eſtabliſhed by "Acts of the *Britiſh* Parliament, have, in a lawleſs manner, "without even the ſemblance of juſt authority, been ſeized by "his Majeſty's ſhips of war, and carried into the harbour of "*Boſton*, and other ports, where they have been rifled of their "cargoes, by order of his Majeſty's naval and military officers, "there commanding, without the ſaid veſſels having been pro-"ceeded againſt by any form of trial, and without the charge of "having offended againſt any law.

"And whereas orders have been iſſued in his Majeſty's "name, to the commanders of his ſhips of war, to proceed as "in the caſe of actual rebellion againſt ſuch of the ſea-port "towns and places being acceſſible to the king's ſhips, in "which any troops ſhall be raiſed or military works erected, "under

" under colour of which ſaid orders, the commanders of his ma- 1795.
" jeſty's ſaid ſhips of war have already burned and deſtroyed
" the flouriſhing and populous town of *Falmouth*, and have
" fired upon and much injured ſeveral other towns within the
" United Colonies, and diſperſed at a late ſeaſon of the year,
" hundreds of helpleſs women and children, with a ſavage hope,
" that thoſe may periſh under the approaching rigours of the
" ſeaſon, who may chance to eſcape deſtruction from fire and
" ſword, a mode of warfare long exploded amongſt civilized
" nations.

" And whereas the good people of theſe colonies, ſenſibly
" affected by the deſtruction of their property and other unpro-
" voked injuries, have at laſt determined to prevent as much
" as poſſible a repetition thereof, and to procure ſome repara-
" tion for the ſame, by fitting out armed veſſels and ſhips of
" force. In the execution of which commendable deſigns it is
" poſſible, that thoſe who have not been inſtrumental in the
" unwarrantable violences above mentioned may ſuffer, unleſs
" ſome laws be made to regulate, and tribunals erected compe-
" tent to determine the propriety of captures. Therefore re-
" ſolved,

" 1. That all ſuch ſhips of war, frigates, ſloops, cutters,
" and armed veſſels as are or ſhall be employed in the preſent
" cruel and unjuſt war, againſt the United Colonies, and ſhall
" fall into the hands of, or be taken by, the inhabitants thereof,
" be ſeized and forfeited to and for the purpoſes herein after
" mentioned.

" 2. Reſolved, That all tranſport veſſels in the ſame ſervice,
" having on board any troops, arms, ammunition, cloathing,
" proviſions, military or naval ſtores of what kind ſoever, and
" all veſſels to whomſoever belonging, that ſhall be employed
" in carrying proviſions or other neceſſaries to the *Britiſh* army
" or armies, or navy, that now are, or ſhall hereafter be within
" any of the United Colonies, or any goods, wares, or mer-
" chandize for the uſe of ſuch fleet or army, ſhall be liable to
" ſeizure, and with their cargoes ſhall be confiſcated.

" 3. That no maſter or commander of any veſſel ſhall be en-
" titled to cruize for, or make prize of any veſſel or cargo, be-
" fore he ſhall have obtained a commiſſion from the Congreſs,
" or from ſuch perſon or perſons as ſhall be for that purpoſe ap-
" pointed, in ſome one of the United Colonies.

" 4. That it be and is hereby recommended to the ſeveral
" legiſlatures in the United Colonies, as ſoon as poſſible, to
" erect Courts of Juſtice, or give juriſdiction to the courts now
" in being, for the purpoſe of determining concerning the cap-
" tures to be made as aforeſaid, and to provide that all trials in

" ſuch

1795. "such case be had by a Jury under such qualifications, as to "the respective legislatures shall seem expedient,

"5. That all prosecutions shall be commenced in the court of "that Colony, in which the captures shall be made, but if no "such court be at that time erected in the said colony, or if "the capture be made on open sea, then the prosecution shall "be in the court of such Colony as the captor may find most "convenient; provided that nothing contained in this resolu- "tion shall be construed so as to enable the captor to remove "his prize from any Colony competent to determine concerning "the seizure, after he shall have carried the vessel so seized "within any harbor of the same.

"6. That in all cases an appeal shall be allowed to the Con- "gress, or such person or persons as they shall appoint for the "trial of appeals, provided the appeal be demanded within five "days after definitive sentence, and such appeal be lodged with "the secretary of Congress within forty days afterwards, and "provided the party appealing shall give security to prosecute "the said appeal to effect, and in case of the death of the secre- "tary during the recess of Congress, then the said appeal to be "lodged in Congress within twenty days after the meeting "thereof.

"7. That when any vessel or vessels, shall be fitted out, at "the expence of any private person or persons, then the cap- "tures made, shall be to the use of the owner or owners of the "said vessel or vessels; that where the vessels employed in the "capture shall be fitted out at the expence of any of the Uni- "ted Colonies, then one third of the prize taken shall be to "the use of the captors, and the remaining two thirds to the "use of the said Colony, and where the vessels so employed, "shall be fitted out at the continental charge, then one third "shall go to the captors, and the remaining two thirds, to the "use of the United Colonies; provided nevertheless, that if "the capture be a vessel of war, then the captors shall be enti- "tled to one half of the value, and the remainder shall go to "the colony or continent as the case may be, the necessary "charges of condemnation of all prizes being deducted before "distribution made."

That, on the 23d March, 1776, Congress resolved that the inhabitants of these colonies be permitted to fit out armed ves- sels, to cruise on the enemies of the United Colonies.

That, on the 2d April, 1776, Congress agreed on the form of a commission to commanders of private ships of war; that the commission run in the name of the Delegates of the *United Colonies of New-Hampshire, &c. and was signed by the Presi- dent of Congress.*

That, on the 3d *July*, 1776, the Legislature of *New-Hamp- shire,*

shire, passed an act for the trial of captures; of which the part material in the present controversy, is as follows:— 1795.

"And be it further enacted, That there shall be erected and constantly held in the town of *Portsmouth*, or some town or place adjacent, in the county of *Rockingham*, a court of justice, by the name of the Court Maritime, by such able and discreet person, as shall be appointed and commissioned, by the Council and Assembly, for that purpose, whose business it shall be to take cognizance, and try the justice of any capture or captures, of any vessel or vessels, that have been, may or shall be taken, by any person or persons whomsoever, and brought into this colony, or any recaptures, that have or shall be taken and brought thereinto.

"And be it further enacted, That any person or persons who have been, or shall be concerned in the taking and bringing into this colony, any vessel or vessels employed or offending, or being the property as aforesaid, shall jointly, or either of them by themselves, or by their attornies, or agents, within twenty days after being possessed of the same in this Colony, file before the said Judge, a libel in writing, therein giving a full and ample account of the time, manner, and cause of the taking such vessel or vessels. But in case of any such vessel or vessels, already brought in as aforesaid, then such libel shall be filed within twenty days next after the passing of this act, and at the time of filing such libel, shall also be filed, all papers on board such vessel or vessels, to the intent, that the Jury may have the benefit of the evidence, therefrom arising. And the judge shall as soon as may be, appoint a day to try by a jury, the justice of the capture of such vessel or vessels, with their apurtenances and cargoes; and he is hereby authorized and empowered to try the same. And the same judge shall cause a notification thereof, and the name, if known, and description of the vessel, so brought in, with the day set for the trial thereon, to be advertised in some newspapers printed in the said Colony (if any such paper there be) twenty days before the time of the trial, and for want of such paper, then to cause the same notification to be affixed on the doors of the Town-House, in said *Portsmouth*, to the intent that the owner of such vessel, or any persons concerned, may appear and shew cause (if any they have) why such vessel, with her cargo and appurtenances, should not be condemned as aforesaid. And the said Judge shall, seven days before the day set and appointed for the trial of such vessel, or vessels, issue his warrant to any constable or constables within the county aforesaid, commanding them, or either of them, to assemble the inhabitants of their towns respectively, and to draw out of the box, in manner provided for drawing jurors, to serve at the Superior

1795. Court of Judicature, ſo many good and lawful men as the ſaid Judge ſhall order, not leſs than twelve, nor exceeding twenty-four; and the conſtable or conſtables ſhall, as ſoon as may be, give any perſon or perſons, ſo drawn to ſerve on the jury in ſaid Court, due notice thereof, and ſhall make due return of his doings therein to the ſaid Judge, at or before the day ſet and appointed for the trial. And the ſaid jurors ſhall be held to ſerve on the trial of all ſuch veſſels as ſhall have been libelled before the ſaid Judge, and the time of their trial, publiſhed, at the time ſaid jurors are drawn, unleſs the Judge ſhall ſee cauſe to diſcharge them, or either of them before; and if ſeven of the jurors ſhall appear and there ſhall not be enough to compleat the number of twelve (which ſhall be a pannel) or if there ſhall be a legal challenge, to any of them, ſo that there ſhall be ſeven, and not a pannel, it ſhall and may be lawful for the Judge, to order his clerk, the ſheriff, or other proper officer, attending ſaid court, to fill up the jury with good and lawful men preſent; and the ſaid jury when ſo filled up, and impannelled, ſhall be ſworn to return a true verdict, on any bill, claim, or memorial which ſhall be committed to them according to law, and evidence; and if the jury ſhall find, that any veſſel or veſſels, againſt which a bill or libel is committed to them have been offending, uſed, employed or improved as aforeſaid, or are the property of any inhabitants of *Great-Britain* as aforeſaid, they ſhall return their verdict thereof to the ſaid Judge, and he ſhall thereupon condemn ſuch veſſel or veſſels, with their cargoes, and appurtenances, and ſhall order them to be diſpoſed of, as by law is provided: and if the jury ſhall return a ſpecial verdict, therein ſetting forth certain facts, relative to ſuch veſſel or veſſels (a bill againſt which is committed to them) and it ſhall appear to the ſaid Judge, by ſaid verdict, that ſuch veſſel or veſſels, have been infeſting the ſea coaſt of *America*, or navigation thereof, or that ſuch veſſels have been employed, uſed, improved, or offending, or are the property of any inhabitant, or inhabitants of *Great-Britain*, as aforeſaid, he, the ſaid Judge, ſhall condemn ſuch veſſel or veſſels, and decree them to be ſold, with their cargoes, and appurtenances, at public vendue; and ſhall alſo order the charges of ſaid trial and condemnation, to be paid out of the money which ſuch veſſel and cargo, with her appurtenances, ſhall ſell for to the officers of the court, according to the table of fees, laſt eſtabliſhed by law of this Colony, and ſhall order the reſidue thereof to be delivered to the captors, their agents, or attornies, for the uſe and benefit of ſuch captors, and others concerned therein: and if two or more veſſels (the commanders whereof, ſhall be properly commiſſioned) ſhall jointly take ſuch veſſel, the money which ſhe and her cargo ſhall ſell for (after payment of charges as aforeſaid) ſhall be

be divided between the captors in proportion to their men. And the ſaid Judge is hereby authorized to make out his precept, under his hand and ſeal, directed to the ſheriff of the county aforeſaid (or if thereto requeſted by the captors or agents to any other perſon to be appointed by the ſaid Judge) to ſell ſuch veſſel and appurtenances, and cargo, at public vendue, and ſuch ſheriff or other perſon after deducting his own charges for the ſame, to pay and deliver the reſidue, according to the decree of the ſaid Judge. 1795.

"And be it enacted by the authority aforeſaid, That any perſon or perſons, claiming the whole, or any part or ſhare, either as owner or captor of any ſuch veſſel, or veſſels, againſt which a libel is ſo filed, may jointly, or by themſelves, or by their attornies or agents, five days before the day ſet and appointed for the trial of ſuch veſſel or veſſels, file their claim before the ſaid Judge; which claim ſhall be committed to the jury, with the libel, which is firſt filed, and the jury ſhall thereupon determine and return their verdict, of what part or ſhare ſuch claimant or claimants, ſhall have of the capture, or captures; and every perſon or perſons who ſhall neglect to file his or their claim in the manner as aforeſaid, ſhall be forever barred therefrom.

"And be it further enacted by the authority aforeſaid; That every veſſel, which ſhall be taken and brought into this Colony, by the armed veſſels of any of the United Colonies of *America*, and ſhall be condemned as aforeſaid, the proceeds of ſuch veſſels and cargoes, ſhall go and be, one third part to the uſe of the captors, and the other two thirds, to the uſe of the colony, at whoſe charge, ſuch armed veſſel was fitted out.

"And where any veſſel or veſſels ſhall be taken by the fleet and army of the United Colonies, and brought into this colony, and condemned as aforeſaid, the ſaid Judge ſhall diſtribute and diſpoſe of the ſaid veſſels, and cargoes, according to the reſolves and orders of the *American* Congreſs.

"Andwhereas, the honorable Continental Congreſs have recommended, that in certain caſes an appeal ſhould be granted from the court aforeſaid.

"Be it therefore enacted, That from all judgments, or decrees, hereafter to be given in the ſaid court maritime, on the capture of any veſſel, appurtenances or cargoes, where ſuch veſſel is taken, or ſhall be taken by any armed veſſel, fitted out at the charge of the United Colonies, an appeal ſhall be allowed to the Continental Congreſs, or to ſuch perſon or perſons, as they already have, or ſhall hereafter appoint, for the trials of appeals, provided the appeal be demanded within five days, after definitive ſentence given, and ſuch appeal ſhall be lodged with

1795 with the Secretary of the Congreſs, within forty days afterwards; and provided the party appealing, ſhall give ſecurity to proſecute ſaid appeal with effect; and in caſe of the death of the Secretary, during the receſs of the Congreſs, the ſaid appeal ſhall be lodged in Congreſs, within twenty days, after the next meeting thereof; and that from the judgment, decrees, or ſentence of the ſaid court, on the capture of any veſſel, or cargo which have been or ſhall hereafter be brought into this colony, by any perſon or perſons, excepting thoſe who are in the ſervice of the United Colonies, an appeal ſhall be allowed to the ſuperior court of Judicature, which ſhall next be held in the county aforeſaid.

"And whereas no proviſion has been made by any of the ſaid reſolves for an appeal from the ſentence or decree of the ſaid Judge, where the caption of any ſuch veſſel or veſſels may be made by a veſſel in the ſervice of the United Colonies, and of any particular colony, or perſon together:

"Therefore be it enacted by the authority aforeſaid: That in ſuch caſes, the appeal ſhall be allowed to the then next ſuperior Court as aforeſaid: Provided the Appellant ſhall enter into bonds with ſufficient ſureties to proſecute his appeal with effect. And ſuch ſuperior Court, to which the appeal ſhall be, ſhall take cognizance thereof, in the ſame manner as if the appeal was from the inferior Court of Common Pleas, and ſhall condemn or acquit, ſuch veſſel or veſſels, their cargoes, and appurtenances, and in the ſale, and diſpoſition of them, proceed according to this act. And the Appellant ſhall pay the court, and jury, ſuch fees as are allowed by law in civil actions."

That, on the 30th *January*, 1777, Congreſs reſolved, that a ſtanding committee, to conſiſt of five members, be appointed, to hear and determine upon Appeals brought againſt ſentences paſſed on libels in the courts of Admiralty in the reſpective ſtates.

That *Joſhua Stackpole*, a citizen of *New-Hampſhire*, commander of the armed brigantine called the *M'Clary*, acting under the commiſſion and authority of Congreſs, did, in the month of *October*, 1777, on the high ſeas, capture the brigantine *Suſanna*, as lawful prize.

That *John Penhallow*, *Joſhua Wentworth*, *Ammi R. Cutter*, *Nathaniel Folſom*, *Samuel Sherburne*, *Thomas Martin*, *Moſes Woodward*, *Niel M'Intire*, *George Turner*, *Richard Champney*, *and Robert Furneſs*, all citizens of *New-Hampſhire*, were owners of the brigantine *M'Clary*.

That *George Wentworth* was agent for the captors.

That, on the 11th *November* 1777, a libel was exhibited to the Maritime Court af *New Hampſhire*, in the names of *John Penhallow*

Penhallow and *Jacob Treadwell*, in behalf of the owners of the *M'Clary*, and of *George Wentworth*, agent for the captors, againſt the *Suſanna*, and her cargo; to which claims were put in by *Eliſha Doane*, *Iſaiah Doane*, and *James Shepherd*, citizens of *Maſſachuſetts*. 1795.

That, on the 16th *December*, 1777, a trial was had before the ſaid court, when the Jury found a verdict in favor of the Libellants; whereupon judgment was rendered, that the *Suſanna*, her cargo, &c. ſhould be forfeited, and deemed lawful prize, and the ſame were thereby ordered to be diſtributed according to law.

That an appeal to Congreſs was, in due time, demanded, but refuſed by the ſaid court, becauſe it was contrary to the law of the State.

That then the ſaid Claimants prayed an appeal to the ſuperior Court of *New Hampſhire*, which was granted.

That, on the firſt *Tueſday* of *September*, 1778, the ſuperior Court of *New Hampſhire*, proceeded to the trial of the ſaid appeal, when the Jury found in favour of the Libellants; that thereupon the court gave judgment, that the *Suſanna*, with her goods, claimed by *Eliſha Doane*, *Iſaiah Doane*, and *James Shepherd*, were forfeited to the Libellants, and the ſame were ordered to be ſold at public vendue, for their uſe and benefit, and that the proceeds thereof, after deducting the coſts of ſuit, and charges of ſale, be paid to *John Penhallow* and *Jacob Treadwell*, agents for the owners, and to *George Wentworth*, agent for the captors, to be by them paid and diſtributed according to law.

That the claimants did, in due time, demand an appeal from the ſaid ſentence to Congreſs, and did alſo tender ſufficient ſecurity or caution to proſecute the ſaid appeal to effect, and that the ſame was lodged in Congreſs, within forty days after the definitive ſentence was pronounced in the ſuperior court of *New Hampſhire*.

That, on the ninth of *October*, 1778, a petition from *Eliſha Doane* was read in Congreſs, accompanied with the proceedings of a Court of Admiralty for the State of *New Hampſhire*, on the libel, *Treadwell* and *Penhallow*, *verſus* brig *Suſanna*, &c. praying, that he may be allowed an appeal to Congreſs; whereupon it was ordered, that the ſame be referred to the committee on appeals. *Fourth Journal of Congreſs*, 586.

That, on the 26th *June*, 1779, the commiſſioners of appeal, or the Court of Commiſſioners, gave their opinion, that they had juriſdiction of the cauſe.

That the articles of confederation bear date the 9th *July*, 1778, and were ratified by all the ſtates on the 1ſt *March*, 1781.

That,

1795. That, by these articles, the *United States* were vested with the sole and exclusive power of establishing courts for receiving and determining finally appeals in all cases of capture.

That such a court was established, by the style of "The "Court of Appeals in cases of capture." By the commission, the Judges were "to hear, try, and determine all appeals from "the Courts of Admiralty in the States respectively, in cases "of capture." 6*th Journal of Congress*, 14, 21, 75.

That, on the 24th *May*, 1780, Congress resolved, "That all matters respecting appeals in cases of capture, now depending before Congress, or the Commissioners of Appeals, consisting of Members of Congress, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law."

That in the month of *September*, 1783, the Court of Appeals, before whom appeared the parties by their advocates, did, after a full hearing and solemn argument, finally adjudge and decree, that the sentences or decrees passed by the inferior and superior Courts of Judicature of *New Hampshire*, so far as the same respected *Elisha Doane*, *Isaiah Doane*, and *James Shepherd*, should be revoked, reversed, and annulled, and that the property, specified in their claims, should be restored, and that the parties each pay their own costs on the said appeal.

Here the cause rested till the adoption of the existing Constitution of the *United States*; except an ineffectual struggle before Congress, on the part of *New Hampshire*, and an unavailing experiment, at common law, to obtain redress on the part of the Appellants. After the organization of the judiciary under the present government, the representatives of *Elisha Doane*, who was one of the Appellants, exhibited a libel in the District Court of *New Hampshire*, which was legally transferred to the Circuit Court, against *John Penhallow*, *Joshua Wentworth*, *Ammi R. Cutter*, *Nathaniel Folsom*, *Samuel Sherburne*, *Thomas Martin*, *Moses Woodward*, *Niel M'Intire*, *George Turner*, *Richard Champley*, *Robert Furness*, & *George Wentworth*.

This libel, after setting forth the proceedings in the different courts, states, that the brigantine *Susanna*, with her tackle, furniture, apparel and cargo, and also the monies arising from the sales thereof, came, after the capture, to the hands and possession of *Joshua Wentworth*, and *George Wentworth*, whereby they became liable for the same, together with the captors and owners. That after the death of *Elisha Doane*, letters of administration of the personal estate of the said *Elisha* were granted to *Anna Doane*, his widow, and *Isaiah Doane*, and that the widow afterwards intermarried with *David Stoddard Greenough*. The Libellants pray process against the respondents

pondents to ſhew cauſe, why the decree of the Court of Appeals ſhould not be carried into execution, and they alſo pray, that right and juſtice may be done in the premiſes and that they may recover ſuch damages as they have ſuſtained by reaſon of the taking of the *Suſanna*. 1795.

The Reſpondents, proteſting, that they never were owners of the *M'Clary*, and that they have none of the effects of the *Suſanna*, nor her cargo in their poſſeſſion, ſay, that the *Suſanna* was in the cuſtody of the Marſhal, and, upon the final decree of the ſuperior Court of *New Hampſhire*, ſold for the benefit of the owners and mariners of the *M'Clary*, and diſtributed among them according to law; that the deciſion of the ſaid court was final; that no other court ever had, or hath, or ever can have power to revoke, reverſe and annul the ſaid decree, and, in a ſubſequent part of the pleadings, that the Diſtrict Court of *New Hampſhire* hath no authority to carry the decree of the Court of Appeals into execution, or to give damages.

To this ſort of plea and anſwer, neither and yet both, the Libellants reply, that the matters contained in their libel are juſt and true, and that they are ready to verify and prove the ſame; that the matters and things alledged by the Reſpondents are falſe and untrue; that the Court of Commiſſioners, and Court of Appeals were duly conſtituted, and had juriſdiction of the ſubject-matter; that no other Court hath or can have authority to draw into queſtion the legality of their deciſions, and that the Diſtrict Court of *New Hampſhire* hath juriſdiction.

I have extracted and conſolidated the material parts of the libel, plea, anſwer, replication, rejoinder, ſur-rejoinder, &c. if they may be ſo termed, without detailing the allegations of the parties as they ariſe in the courſe of procedure.

Upon theſe pleadings the parties went to a hearing before the Circuit Court of *New Hampſhire*, which, after full conſideration, decreed, that the Reſpondents ſhould pay to the Libellants their damages and coſts, occaſioned by their not complying with the decree of the Court of Appeals; the quantum of which to be aſcertained by Commiſſioners. This interlocutory ſentence was pronounced the 24th *October*, 1793.

The Commiſſioners reported, that the *Luſanna*, her cargo, &c. were, on the 2d *October*, 1778, being the aſſumed time of ſale, worth £.5,895 14 10

That they calculated thereon 16 years intereſt, viz. from the 2d. *October* 1778, to 2d. *October* 1794, amounting to 5,659 17 4

£.11,555 12 2

On

1795. On this report being affirmed, the Circuit Court pronounced their definitive ſentence on the 24th *October*, 1794, that the Libellants recover againſt the Reſpondents the ſum of 38,518 dollars and 69 cents, damages, and 154 dollars, and 30 cents, coſts. The Reſpondents, conceiving themſelves aggrieved, have removed the cauſe before this court for reviſion."

The Record being returned, the Plaintiff in error on the 2d February 1798, aſſigned the following errors:

"To the Chief Juſtice and the Aſſociate Juſtices of the Supreme Court of the *United States*, to be holden at the City of *Philadelphia*, on the firſt *Monday* of *February* in the year of our Lord one thouſand ſeven hundred and ninety-five, *John Penhallow*, *Joſhua Wentworth*, *Ammi Ruhammah Cutter*, *Nathaniel Fulſom*, *Samuel Sherburne*, *ſen. Thomas Martin*, *Moſes Woodward*, *Neal M'Intire*, *George Turner*, *Richard Champney*, *Robert Furneſs*, *and George Wentworth*, Plaintiffs in error, againſt *David Stoddart Grenough*, and *Anna* his wife, and *Iſaiah Doane*, Adminiſtrators of the eſtate of *Eliſha Doane*, deceaſed, Defendants.

"HUMBLY SHEW, That in the Record and Proceſs aforeſaid, hereto annexed, and in paſſing the final Decree, it is manifeſtly erred in this, viz. That whereas it was decreed in favour of the ſaid *David Stoddart Grenough*, and *Anna* his wife, and *Iſaiah Doane*, the ſaid decree ought to have been in favour of the ſaid *John Penhallow*, and others, the Plaintiffs:—and for other and further Errors, they aſſign the following, viz.

"*Firſtly*. That by ſaid decree it was ordered, that the ſaid *John Penhallow* and others, Plaintiffs, be condemned in damages for their not performing a certain decree of a Court claiming Appellate juriſdiction in prize cauſes, held in the City of *Philadelphia*, on the *ſeventeenth day of September*, *Anno Domini*, 1783, when, in fact, the ſaid laſt mentioned Court had no juriſdiction power, or authority whatever, by law, to make and paſs the ſaid decree; and that the ſaid decree was illegal and a nullity.

"*Secondly*. That there is alſo manifeſt Error in this, viz. That if the ſaid laſt mentioned Court had at the time of their paſſing ſaid decree, Appellate juriſdiction of ſaid cauſe, yet ſaid decree was altogether erroneous and impoſſible to be performed or executed, becauſe, (as by the ſaid *Greenough*'s and others own ſhewing, in their libel aforeſaid) the ſaid *Eliſha Doane* was, at the time of making and paſſing the ſaid decree, viz. on the *ſeventeenth day of September*, *Anno Domini* 1783, and long before that time, dead; when, by the ſame decree, it is ordered that reſtoration of ſaid property be made to ſaid *Eliſha Doane*.

"*Thirdly*. There is alſo manifeſt error in this, viz. That ſaid cauſe was not brought before Congreſs, or the Commiſſioners by

by them appointed, to hear and try appeals in prize cauſes, ac- 1795.
cording to the Reſolve of Congreſs, but repugnant thereto, viz.
by way of complaint, and that no appeal from the ſaid decree of ſaid Court of *New-Hampſhire*, was allowed by the ſame Court, or by Congreſs.

Fourthly. There is alſo manifeſt error in this, viz. That in and by the ſaid libel upon which the decree aforeſaid in ſaid Circuit Court is made, damages for not performing the decree of ſaid Court of Appeals, are not prayed for—wherefore, the ſaid Circuit Court ought not to have decreed or condemned the Plaintiffs in damages as is done by ſaid final decree.

Fifthly. There is alſo manifeſt error in this, viz. That ſaid final decree of ſaid Circuit Court, was not made upon a due trial and examination of the merits of the capture of the ſaid Brigantine *Suſanna*, her tackle, apparel and furniture, and of the goods, wares, and merchandizes, and of the evidences or proofs which might have been adduced by the Plaintiffs in error if ſuch trial had been had. But the decree of the Court of Appeals was received and admitted as the only evidence of the right of claim of the ſaid *Grenough* and others, the libellants, to the ſaid Brigantine, her tackle, apparel and furniture, and of the ſaid goods, wares and merchandizes, condemned, and of the illegality of the capture and condemnation aforementioned in ſaid libel, which is contrary to the uſage and cuſtoms of Admiralty, Maritime and Prize Courts, and altogether unwarranted by law.

Sixthly. There is manifeſt error alſo, in this, viz.—That by the ſhewing of the ſaid Libellants, the monies ariſing from the ſale of ſaid brigantine and cargo, &c. were paid to the ſaid *Joſhua Wentworth* and *George Wentworth* as agents, to be diſtributed according to law, viz: one half to the owners of the ſaid privateer, *M'Clary*, and the other to the captors, viz. to the officers and ſeamen on board, which were diſtributed accordingly. Whereas in fact by ſaid final decree, they the Plaintiffs in error, and *Joſhua* and *George* as agents, and the other Plaintiffs as owners, are made liable, and condemned in full damages for the whole value of ſaid brigantine, her tackle, apparel, and furniture, and of ſaid goods, wares and merchandizes, which is altogether illegal.

Seventhly. There is alſo manifeſt error in this, viz.—That it doth not appear by the copy of the record of ſaid Court of Appeals, filed and uſed in this cauſe, how the ſame cauſe, in which that court decreed as aforeſaid, came before ſaid court, or was legally inſtituted, or had day therein, at the time of paſſing ſaid decree.

Eighthly. There is manifeſt error in this, alſo, viz.—That ſaid Circuit Court, in paſſing ſaid final decree, and in all the

1795. proceedings in the ſame, acted and proceeded as a Court of Admiralty, when as ſuch, they, by law, had no juriſdiction of ſaid cauſe, and could not legally take cognizance thereof.

WHEREFORE, for theſe and other errors in the record and proceſs, and final decree aforeſaid, of the ſaid Circuit Court, the ſaid Plaintiffs in error, pray, That the final decree aforeſaid, of the ſaid Circuit Court, may be reverſed, annulled, and held to be altogether void, and they reſtored to all things which they have loſt.

JOHN S. SHERBURNE.

The Defendants replied in *nullo eſt erratum*; and thereupon iſſue was joined.

For the Plaintiffs in error, the arguments were of the following purport.

I. ERROR. This is a queſtion between citizens of the *United States*; a citizen of one State being a citizen of every State. *Conſt. Art. 3.* Queſtions between ſubjects of different States, belong entirely to the law of nations. 3 *Bl. Com.* 69. but between citizens of the ſame State, the municipal law, even in queſtions of prize during a war, is of ſupereminent control. 1 *Wood.* 137. 2 *Wood.* 3 *Wood.* 454. *Hen. Bl. Rep.* 4 *T. Rep.* 3 *Atk.* 195. *Parke* 166. 180. 3 *Bro.* 304. But this appeal was never properly before the Congreſſional Court of Appeals. *Doane* petitioned Congreſs, and Congreſs referred the petition to the Committee of Appeals. 6 *Vol. Journ. Cong.* 133, 167. In the caſe of the *Sandwich Packet*, a committee was appointed, and upon their report, Congreſs allowed the appeal. Regularly, in the preſent inſtance, the appeal ought to have been allowed by the court below, and the record lodged with the Secretary of Congreſs; or there ſhould, at leaſt, appear a ſpecial allowance of the appeal by Congreſs, as in the caſe of the *Sandwich Packet*, and not a mere reference to a committee. The court of *New Hampſhire*, in fact, refuſed to allow the appeal; and the appearance of the party in the Congreſſional Court of Appeals, could not cure any defect, as he there pleaded directly to the juriſdiction, and notice ſignifies nothing againſt a compulſory judgment. The legal, cuſtomary, modes to compel the return of a record, by *certiorari*, and a writ of diminution, &c. might have been reſorted to. 3 *Bac. Abr.* 204. *Conſt on courts.* 187. There was no privity between the Court of Appeals and the Circuit Court; and an inferior Court cannot execute the decrees of a ſuperior Court. 1 *Sid.* 418. 1 *Vent.* 32. 6 *Vin.* 373. *pl.* 2. *Eſp.* 87. 1 *Lev.* 243. *Raym.* 473. *Doug.* 580. *Cowp.* 176. But had the Congreſſional Court of Appeals juriſdiction in this caſe? That court is extinct; and may now be conſidered in the light of a foreign court; and the decres of foreign courts are regarded on a footing

a footing of reciprocity. Whether, then, the Congreſſional Court of Appeals, was, in this inſtance, a court of the laſt reſort, is the gift of the controverſy; and we contend that it was not, but that the ſuperior Court of *New Hampſhire*, was, by the law of the State, the Court of the laſt reſort. On an appeal, or on a writ of error, like this, in the nature of an appeal, the Plaintiff in error may uſe every defence which he could have urged below; and the authorities evince that the competency of the court giving the judgment may be enquired into. 1 *Bac. Abr.* 630. *Doug.* 5. 3 *Term Rep.* 29. 130. 132. 269. *Carth. Parke on Inſ.* 11 *State Trials*, 222. 232. 2 *Dom.* 676 *Ayl.* 72. 3. Whether the Congreſſional Court had any juriſdiction at all, muſt depend on a compariſon between the reſolves of Congreſs of *November* 1775, and the law of *New Hampſhire*, of *July* 1776; and to ſolve that difficulty, three ſubordinate queſtions may be diſcuſſed: —1ſt. Had Congreſs *excluſive* juriſdiction of prize cauſes in *Nov.* 1775?—2d. Are their reſolutions on that ſubject mandatory and abſolute; or recommendatory—and 3d. Did they neceſſarily imply, and authoriſe, a reviſion of facts, which had already been eſtabliſhed by the verdict of a Jury.— 1795.

1. Had Congreſs excluſive juriſdiction of prize cauſes in *Nov.* 1775? If *New Hampſhire* had any original right to take cognizance of prize cauſes, the Plaintiff in error muſt prevail; for, in ſuch caſe, the juriſdiction would be, at leaſt, concurrent with that claimed by Congreſs. But, wherever an alliance is not *corporate*, but *confederate*, the ſovereignty reſides in each State. *Federaliſt*, *p. Adams' Def.* 162. 3. And in the hiſtories of *Holland* and of *Germany* the rule will be illuſtrated and confirmed. 1 *Monteſq.* 263. 7 *Vol. Encyclopædia*, 709. *Cheſterfield's Works*, 1 *vol. Sir William Temple*, 114. *Adams' Def.* 362. Now, the State retained all the powers which ſhe did not expreſsly ſurrender to the Union; a State cannot ceaſe to be ſovereign without its own act; nor can ſovereignty be aſſerted but upon a clear title. 7 *Journ. Cong. p.* 49, &c. Congreſs had only the power to *recommend* certain acts to the States, they had no abſolute right to enforce a performance, nor to inflict a penalty for diſobedience. Whatever power Congreſs poſſeſſed muſt have been derived from *the People*. If Congreſs had a right of erecting Courts of Appeals from *New Hampſhire*, it muſt be in conſequence of an authority derived from *New Hampſhire*; —all the other twelve States could not give it: Nor had Congreſs the *excluſive* power of war; as a retroſpective view of the revolutionary occurrences will demonſtrate. The Colonies, totally independent of each other before the war, became diſtinct, independent, States, when they threw off their allegiance to the *Britiſh* crown, and Congreſs was no longer a Convention of Agents for Colonies, but of Ambaſſadors from

Re-

1795. sovereign States. *Adams' Def.* 1 *vol.* 362. 3. 4. In that character they were uniformly considered by Congress; and on the 24th of *June*, 1776, [2 *Vol. Journ. Cong.* 229.] when that body recommends passing laws on the subject or treason, the crime is declared to be committed against the colonies, individually, and not against the confederation. The powers of the first Congress of 1774, were, indeed, only those of consultation, to project the proper measures for obtaining a redress of grievances: they were, in effect, a counsel of advice. Their credentials, as well as the opinions of writers, manifest the truth of this assertion. 1 *Ramsay's Hist.* 143. 1 *Journ. Cong.* 17. 54. 55. The second Congress sat on the same authority; with the same latitude to obtain a redress of grievances; but, all the credentials of the members bear date before the news of the battle of *Lexington*; (19 April 1775) those from *Pennsylvania*, *New-Jersey*, and *Virginia*, merely authorise a meeting in Congress; and none of the rest hold out the idea of war, though those from *Massachusetts* seem to have given the greatest latitude. 1 *Journ Cong.* 56. 3 *Vol Cong.* 14. It appears clearly, then, that Congress at those stages of the Revolution, possessed no positive powers, by express delegation. When, however, the war afterwards came on, Congress seized on such powers as the necessity of the case required to be exercised: but still, the validity of those powers depends on subsequent ratifications, or universal acquiescence; and if *New-Hampshire* has ever ratified the assumption of a right to hold appeals *in all cases* of capture as prize, we abandon the cause. But in a variety of instances, it is manifest, that, although some of the assumed powers of Congress were confirmed, others were denied and repelled. Thus, the power of embargo was desired by Congress, but never conceded by the states. 4 *Journ. Cong.* 575. 321. 331; and in *Pennsylvania*, it was even thought necessary to pass a law to indemnify, all persons, who acted under the authority of the resolutions of Congress, &c. 2 *Vol. Dall. Edit.* 111. Still, however, it is conceded, that Congress, from the necessity of the case, and a general acquiescence, might raise an army, and direct the military operations of the war; though even in that respect, it is questionable, whether *Massachusetts* would have consented to the Congressional appointment of a commander in chief, had General *Ward* been successful at *Bunker's Hill*. But the States, by their acquiescence in this exercise of the rights of war, on the part of Congress, did not convey an exclusive power to the Federal head, nor divest themselves of their individual authority to wage war, issue letters of marque, &c. War is that state in which a nation prosecutes its rights by force, *Vatt. b.* 3. *c.* 1. *s.* 1. Now, the fact is, that the *New-England*

England colonies had firſt made war, according to this definition; and at their inſtance the other colonies afterwards joined them. 1 *Ramſay's Hiſt.* 192. *New-Hampſhire*, accordingly, voted 2000 men for the ſervice. *Ib.* 395; eſtabliſhed poſt-offices; and veſted a committee of ſafety with powers equal to thoſe of a dictator. *Ib.* 395. *Connecticut*, likewiſe, made war on her own individual authority; *Ticonderoga* was taken by *Allen*; and *Arnold* made a prize of a veſſel on *Lake Champlaine*. *Gord. Hiſt.* 349. 1 *Vol. Journ. Cong.* 81. At this period the States muſt have been poſſeſſed of individual ſovereignty; for, the ſovereign power alone can raiſe troops. *Vatt. b.* 2. *c.* 2. *ſ.* 7; and both *Maſſachuſetts* and *Connecticutt* had actually fitted out and armed veſſels to cruize againſt the enemy in October, 1775, (*South-Carolina* ſoon following the example) whereas the reſolution of Congreſs reſpecting prizes, did not paſs till the ſucceeding month. *Gord. Hiſt.* 428. *Ramſay's Hiſt.* 224. Could the reſolutions of Congreſs at that time take away the juriſdiction of *New-Hampſhire*, without her own conſent? and the articles of confederation, at a later period, expreſsly reſerved to the reſpective ſtates, the right of iſſuing letters of marque, &c. after a declaration of war by the *United States*. By conſidering the circumſtances under which Congreſs exerciſed other powers, we may be furniſhed with ſome analogies in ſupport of our doctrine, reſpecting the power claimed, as an incident of war, to hold appeals in all caſes of capture. Congreſs were allowed to iſſue money; but they could not guard it from counterfeit, nor make it a legal tender; nor effectually bind the States to redeem it; though all theſe incidents were eſſential to ſupport the credit and currency of the money. Congreſs aſſumed the power of regulating the poſt-office; but they could impoſe no penalties for a breach of their reſolution on the ſubject. Congreſs received Ambaſſadors, and other public miniſters; but when the immunity of the *French* miniſter's houſe was violated, the State of *Pennſylvania* only could puniſh the offender. *Dall. Rep. De Longchamp's* caſe. Congreſs made treaties, but they could make no law to enforce an obſervance of them. Even for effectuating their reſolutions, relative to admiralty juriſdiction, Congreſs were obliged to addreſs themſelves by recommendation to the ſtates, individually; 5 *Journ. Cong.* 215; and *New-Hampſhire* paſſed a law, granting to Congreſs the power that was requeſted, *in the caſe of foreigners only*, with an allowance of only a day for making the appeal. In that law Congreſs acquieſced, *Ib.* 459. till the diſpute aroſe in this very caſe. 9 *Journ. Cong.* 45. 87. 97. 98. *Dall. Rep.* 71. This diſtinction has been taken in *Pennſylvania*, that on the evacuation of *Philadelphia*, all puplic military property belonged to Congreſs, and all private property to the State. To manifeſt, 1795.

1795. manifeſt, if poſſible, more forcibly the participation of the individual ſtates, in the power aſſumed and exerciſed by Congreſs, we find that the very commiſſions iſſued by Congreſs, were counterſigned by the Governors of the reſpective ſtates. By the law of *New-Hampſhire*, paſſed in July 1776, a power was given to the Executive to iſſue letters of marque, &c. and the act of counterſigning the congreſſional commiſſions was equivalent to the exerciſe of that power. In the inſtructions to privateers, it is, likewiſe obſervable, that Congreſs authoriſe the captors to proceed to libel and condemn their prizes "in any court erected for the trial of maritime affairs, in any of theſe colonies." 2 *Journ. Cong.* 106. 116. 118. But ſurely, it is poſſible for a ſtate, to delegate the power of iſſuing letters of marque, &c. and yet retain a juriſdiction over prizes brought into her ports; or, reverſing the propoſition, to give up that juriſdiction, and yet retain the power of iſſuing letters of marque. A court of appeal is not a neceſſary incident of ſovereignty. If there be a court judging by the law of nations, no complaint can be made by foreign powers; the reſt depends on municipal law. 4 *T. Rep.* 382. 3 *Atk.* 401. *Coll. Jurid.* It has been queſtioned, indeed, whether any court can decide on the legality of a prize, which has been captured under the authority of a different power, from that by which the court was conſtituted: but in the caſe of a confederated ſovereignty, each member of the confederation may, undoubtedly, give power to the others to decide on prizes taken under its ſeparate authority. Thus, likewiſe, it appears that *France* eſtabliſhed courts in the Weſt-Indies, to determine the legality of prizes taken by *American* veſſels, although no article of the treaty provided for ſuch an eſtabliſhment. 5 *Journ. Cong.* 440. In other treaties, however, the caſe is expreſsly provided for, and the judicatures of the place, into which the prize, taken by either of the contracting parties, ſhall have been conducted, may decide on the legality of the captures, according to the laws and regulations of the States, to which the captors belong. *Pruſſian Treaty. Art.* 21. *ſ.* 4. *Dutch Treaty. Art.* 5. *Swediſh Treaty, Art.* 18. *ſ.* 4. But the language of the articles of confederation demonſtrates the political independence, and ſeparate authority, of the States: "each ſtate retains its ſovereignty, freedom, and independence, and every power, juriſdiction and right, which is not by this confederation *expreſsly* delegated to the *United States*, in Congreſs aſſembled." *Art.* 3. If, indeed, the States had not, individually, all the powers of ſovereignty, how could they transfer ſuch powers, or any of them, to Congreſs? Does not Congreſs itſelf, by the appointment of a committee to draft the articles of confederation; and by its earneſt ſolicitation, that the ſeveral ſtates would ratify

tify the inſtrument; evince a ſenſe of its own political impo- 1795.
tence, and of the plenitude of the State authorities? But, after
all, it muſt be conſidered that *Doane*, the Defendant in error, waved the appeal to Congreſs, by carrying his caſe into the Supreme Court of *New-Hampſhire*, inſtead of applying immediately for relief to Congreſs, when the inferior State Court refuſed to grant an appeal to the congreſſional court of appeals; and the Supreme Court of *Maſſachuſetts* has determined in an action of Trover between the ſame parties, that the court of appeals had no juriſdiction in this cauſe. *Sit finis litium.*

2. The ſecond ſubordinate queſtion is---Are the Reſolutions of Congreſs, reſpecting prize cauſes, mandatory and abſolute; or only recommendatory? In ſpirit and in terms they are no more than recommendatory; ſuch as the State might at pleaſure, either carry into effect, or reject. The State, which erected the Court of Admiralty, poſſeſſed the power, likewiſe, to regulate the Appellate juriſdiction from its decrees. Thus, the act of Pennſylvania modelled the Appellate power in a ſpecial manner, as to the time of appealing; and denied the appeal altogether, as to facts found by the verdict of a jury. The Supreme Court of *New-Hampſhire* was in exiſtence long before the Reſolutions of Congreſs were paſſed; and there is no pretence for Congreſs to claim a controuling, or appellate, power, upon the judgments, or decrees, there pronounced; though Congreſs might *recommend* a particular mode of proceeding as convenient and advantageous. As far as reſpected *Foreigners*, *New-Hampſhire* concurred in the opinion of Congreſs; but rejected it in caſes, like the preſent, between citizens.

3. The third ſubordinate queſtion is---Whether the Reſolutions of Congreſs, neceſſarily imply and authoriſe a reviſion of facts, which had already been eſtabliſhed by the verdict of a jury? The fair conſtruction of the Reſolution of Congreſs is, that there ſhall be an appeal on points of law appearing on the record. The appeal from a jury is not known here, though it is familiar in *New-England*; but even in *New-England*, the appeal is always from one jury to another jury, and a jury may, in ſome meaſure, proceed on their own knowledge. 3 *Bl. Com.* 330. 367. In the caſe of the Sloop *Active* (2 *Vol. p.*) the Chief Juſtice (M'KEAN) was deciſively of opinion, that an appeal did not lie from the Admiralty of the State to the Congreſſional Court of Appeals, as to facts found by a Jury: and, in the ſame caſe, the General Aſſembly expreſſed the ſame opinion, by their inſtructions to the Delegates in Congreſs. *Journals*, 31*ſt of January*, 1780. After a jury Trial, facts cannot be re-examined on a writ of Error. 3 *Bl. Com.* 330. 367.

II.

1795. II. ERROR. It appears on the record that *Doane* was dead when the judgment was given: for, the libel itſelf ſets forth the commitment of adminiſtration to his repreſentatives before judgment; and, although that may not be concluſive, it is ſtrong evidence of his death, upon which the court will decide the fact. *Pr. Reg. ch.* 1. *p.* 264. 3 & 4 *Wood.* 377. 2 *Bac.* 204. 4 *Vin.* 429. *T. Raym.* 463. It has been ſaid, that even if *Doane* were dead, it was no abatement, being in a civil law court. 1 *Cha. Ca.* 122: but the caſe referred to, as an authority, was merely a bill of review, which is not *ſtricti juris*, and was diſmiſſed. Beſides, the perſon who filed that bill had no *privity*, and was not entitled to it; and even if he had, the exception might have been error, notwithſtanding the diſmiſſal of the bill. It is likewiſe ſaid, that death was no abatement in an eccleſiaſtical court. *Lev.* ; but it is evident from the authority cited, that the party repreſenting the deceaſed, muſt come into court before judgment can go againſt him. 3 *Huberus*, 582. The moſt that can reaſonably be urged is, that the decree was good, ſo far as it pronounced the captured ſhip to be free; but it was void, ſo far as it made any order upon *Doane* to do any particular act. See 3 *T. Rep.* 323. The Circuit Court (which has been called a court of *review*) was, in fact, only the Court of Appeals continued; but *Doane's* adminiſtrators were never called upon, and, therefore, could not be obliged to go into that court. The ground of the opinion of the Circuit Court is, that damages ſhall be recovered for not reſtoring the property to *Doane*; who, being then dead, the reſtitution was impoſſible. Beſides, letters of adminiſtration were only taken out in *Maſſachuſetts*, which would not operate in *New Hampſhire*, where alone, if any where, the debt was valid. *Lovelace on wills.*

III. ERROR. The argument in ſupport of this error has been anticipated in diſcuſſing the firſt error aſſigned.

IV. ERROR. Damages were not aſked by the Libellant in the Circuit Court. The libel prays, indeed, that the decree of the Court of Appeals might be carried into effect; that damages might be given for the illegal capture of the ſhip; and that general relief might be granted; but it does not pray for damages on account of the non-performance of the decree of the Court of Appeals. A judgment which gives damages, where they ought not to be given, is erroneous: as where the damages are laid at 100l. in the declaration, and the judgment is rendered for 200l. No damages are to be allowed on reverſal. *Lee on capt.* 241. There ought to have been an account of the value of the thing to be reſtored, by the decree of the Court of Appeals; and as that court gave no damages for the unlawful taking of the veſſel, no other court had power to give them.

them. Nor, indeed, ought any damages to have been given, as the order for reſtitution was not directed to the Reſpondents. Beſides the damages are given againſt the Defendants *jointly*, whereas each ſhould have been charged *ſeverally* with the ſum which came into his hands; 3 *T. Rep.* 371. *Cowp.* 506. 4 *Vin.* 444. 7 *Vin.* 252. And it does not even appear that they had notice of the decree of the Court of Appeals, though it is ſtated on the record that they were heard by their advocates ſometime *before* it was pronounced. A monition ſhould have iſſued; and the ſuperior court ſhould have inhibited the court of *New Hampſhire* from proceeding on their judgment: otherwiſe, if that court did ſo proceed, and under their order the veſſel was ſold and the money paid away, the perſons who paid it are not reſponſible. 3 *T. Rep.* 125. An agent paying over truſt money without notice of appeal, is excuſed. 4 *Burr.* 1985. *Cowp.* 565. 2 *Ld. Ray.* 1210. And the Admiralty only compels agents to account for the money actually in their hands. *H. Bl.* 476. 483. 3. *T. Rep.* 323. 326. 7. 343. 4 *T. Rep.* 382. 393. 1 *Bl. Rep.* 315. In the Admiralty a number of perſons are joined, in order to prevent a multiplicity of ſuits: but, ſubſtantially, each perſon ſtands on his own *ſeparate* ground, and a mode is eſtabliſhed for aſſeſſing ſeveral damages. *Doug.* 579*. 1795.

V. ERROR. That the court below did not examine into the merits, cannot be deemed error, if they had no juriſdiction to meddle with the ſubject at all. This aſſignment of error, therefore, cannot be maintained.

VI. ERROR. The argument on this, was anticipated in the diſcuſſion of the 4th error aſſigned.

VII. ERROR. The argument on this, was anticipated in the diſcuſſion of the firſt error aſſigned.

VIII. ERROR. The fate of this error was ſubmitted, without remark, to the opinion of the court.

For the defendant in error, the anſwers were of the following tenor.

I. ERROR:—The objection that the appeal was not properly before the Congreſſional Court, ought not at this ſtage to be ſuſtained, ſince the party appeared there, and pleaded to the juriſdiction; and the court took cognizance of the cauſe. The court *ad quem*, and not the court *a quo*, the proceeding is brought, muſt determine whether the appeal lay. A certified copy

* PATERSON, *Juſtice*:—If the damages were improperly given, *jointly*, by the Circuit Court, can this court rectify the error, or direct the Circuit Court to do it?

Bradford:—This Court cannot do it, becauſe they are not poſſeſſed of evidence to ſhew in what proportions the damages ought to be paid by the Reſpondents.

1795. copy of the decree of the Court of *New Hampſhire* was lodged with Congreſs; and the caſe was treated in the ſame way that Congreſs (who were not bound down to particular forms) treated other ſimilar caſes. Nor can it injure the Defendant in error, that he took his firſt appeal to the ſuperior Court of *New Hampſhire*; for, that State had certainly a right to eſtabliſh different Courts of Appeal, provided the laſt reſort was made to Congreſs. But an appeal was tendered and refuſed; and a *certiorari* only lies to Courts of Record, which was not the caſe with the inferior Court of *New Hampſhire*. The act of Congreſs directs a removal by writ of error in all caſes and therefore takes away all objections not appearing on the record. Nor is it effectual to ſay, that an inferior court cannot execute the judgment of a ſuperior Court; for, we had no remedy at common law; the queſtion of prize or no prize being ſolely of Admiralty juriſdiction. *Dall. Rep.* : the only remedy was in the Diſtrict Court of *New Hampſhire*. It has even been contended, that a Court of Admiralty of *England* may grant execution on a judgment in *Friezland* againſt an *Engliſhman*. 6 *Vin.* 513. *pl.* 12. 1 *Lev.* 267. 1 *Vent.* 32. *Godb.* 260. and a Court of Admiralty may proceed to give effect to its own ſentence upon a new libel being filed. 4 *T. Rep.* 385. We contend then, that Congreſs had juriſdiction to determine the appeal as well before, as after, the ratification of the articles of confederation :—before the ratification, from the nature and neceſſity of the caſe; and after the ratification from the force of the compact. Congreſs was choſen by the repreſentatives of the people; and when war commenced, it could not have been proſecuted, without veſting that body with a juriſdiction, which, ſhould pervade the whole continent. A formal compact is not eſſential to the inſtitution of a government. Every nation that governs itſelf, under what form ſoever, without any dependence on a foreign power, is a *ſovereign ſtate*. In every ſociety there muſt be a ſovereignty. 1 *Dall. Rep.* 46, 57. *Vatt. B.* 1. *ch.* 1. *ſ.* 4. The powers of war form an inherent characteriſtic of national ſovereignty; and, it is not denied, that Congreſs poſſeſſed thoſe powers. As, therefore, the deciſion of the queſtion, whether prize, or no prize, is a part of the power and law of war, *Doug.* 585. 6. and muſt be governed by the law of nations, 3 *Bl. Com.* 68, 69. 2 *Wood.* 139. 4 *Term Rep.* 394, 400, 401, it follows, as a neceſſary conſequence, that if Congreſs poſſeſſed the whole power of war, it poſſeſſed all the parts;—the incidents, as well as the principal juriſdiction. Under this impreſſion, Congreſs recommended the inſtitution of prize courts in the ſeveral States; but reſerved to itſelf the right of appeal; and its journals are filled with the exerciſe of powers derived from the ſame ſource, and having

ing no greater pretenſions to validity. On the 2d *May*, 1775, the militia are directed to be trained for defence. On the 1ſt *June*, Congreſs declare that they ſtand on the defenſive merely, and the invaſion of Canada by any of the Colonies is objected to. On the 14th *June*, an army is directed to be raiſed. On 15th. *June*, a General is appointed. On the 6th *July*, war is, in effect, declared. On the 7th *November*, the articles of war, inflicting death in certain caſes, were paſſed. On the 25th *Nov.* the reſolutions concerning prizes were adopted. On the 28th *November*, rules and orders were eſtabliſhed for the government of the navy. On the 5th *December* proviſion was made for ſalvage in the caſe of re-captured veſſels. On the 13th *December* a fleet was eſtabliſhed. On 20th *December* it was declared that the law of nations ſhould regulate the proceedings in prize cauſes. On 22d *December*, the Naval Committee act. On 26th *Dec.* the United Colonies are pledged for the redemption of the paper money. On the 23d *March* and 24th *July*, 1776, the equipment of privateers is authoriſed. On 2d and 3d *April*, the form of a commiſſion for privateers is ſettled. On the 4th *July*, Independence is declared. On 26th *Aug.* half pay was allowed to diſabled officers. On 5th *September*, it was reſolved that propoſitions for peace ſhould only be made to Congreſs. On the 9th *September*, a committee is appointed on an appeal in the caſe of the ſchooner *Thiſtle*, and the ſtile of the confederation was changed from "*United Colonies*" to "*United States*." On 16th *September*, additional battalions were raiſed. On 20th *September*, a new ſet of articles of war were ſubſtituted inſtead of the former. On the 21ſt *October*, the oath to be taken by officers in the Continental ſervice was preſcribed. On 30th *January* and 8th *May*, 1777, a ſtanding committee was appointed, to hear and determine appeals. On 31ſt *January*, a decree of a committee was ſet aſide on an appeal. On 8th *May*, a new commiſſion for privateers was ſettled. On the 14th *October*, Congreſs reſolved to retaliate by condemning as prize, the enemy's veſſels, brought in by their own mariners. On the 6th *February*, 1778, Congreſs formed a treaty of alliance with *France*. On 9th *July*, 1778, the articles of confederation were ratified and ſigned by all the ſtates, except *New-Jerſey*, *Delaware*, and *Maryland*. On 27th *July*, 1778, new members were added to the committee of appeals. On 14 *January*, 1779, Congreſs reſolved that they would not conclude a truce or treaty with *Great-Britain*, without the conſent of *France*. On the 6th of *March*, the objection to the appellate juriſdiction of Congreſs, as to facts found by a jury, was urged by *Pennſylvania* in the caſe of the ſloop *Active*. On 15th *Jan.* 1780, and 24th *May*, a court of appeals in the caſe of captures was inſtituted. On 21ſt *January* and 30th *March*, 1784, the proceedings in the caſe of the *Suſanna*, came before 1795.

1795. before Congreſs. On 24th *May*, 1780, the ſtile of the court of appeals was ſettled. On 26th *June*, 1786, a court of review was inſtituted. After ſo extenſive a diſplay of power and juriſdiction, it is abſurd to oppoſe theory to practice, and to reaſon in the abſtract, inſtead of adopting the evidence of facts. But on principle as well as practice, the old commiſſioners of appeals had juriſdiction. Congreſs had an imperfect ſovereignty previous to the declaration of independence; and the articles of confederation are only a definement of rights, before vague and uncertain. The acts of Congreſs were either performed by virtue of delegated powers, or of ſubſequent ratifications, and the acquieſcence of the ſtate legiſlatures and the people. On the declaration of independence, a new body politic was created; Congreſs was the organ of the declaration; but it was the act of the people, not of the ſtate legiſlatures, which were likewiſe nothing more than organs of the people. Having, therefore, a national ſovereignty, extending to all the powers of war and peace, including, as a neceſſary incident, the right to judge of captures, the commiſſioners of appeals were lawfully inſtituted; and it is abſurd to ſay that both the Federal and State governments held ſovereignty in the ſame points, nor can the juriſdiction of the court of appeals that ſucceeded the commiſſioners be now queſtioned. There would, indeed, be no end of diſputes, if the judgments of a Supreme Court, on the point of juriſdiction, could be enquired into. *Lee on Cap.* 242. *Collec. Jurid.* 153. 139. 3 *Bl. Com.* 411. 57. 1 *Bac. Abr* 524. That point was lawfully before the court of appeals; and the court of appeals, when they made their decree, in 1783, were clearly the ſupreme court of admiralty *under the confederation*. The court of appeals took the cauſe up, as it had been left by the commiſſioners of appeals; and not on a new appeal from *New-Hampſhire*; they, therefore, virtually decided, that the commiſſioners of appeals had juriſdiction. If, then, this court may now enquire into the judgment of the court of appeals, every diſtrict court in the Union may do the ſame; and the controverſy would never be at reſt.

The individual States had no right to erect courts of prize, but under the authority of Congreſs, who derived their authority from the whole people of *America*, as one united body. Was it not conſidered, *during the war*, by every man, that Congreſs were thus veſted with this and all the other rights of war and peace, and not the individual ſtates? Why, elſe, was it neceſſary by a ſpecial reſolution of Congreſs, (4 *April*, 1777) to give validity to captures made by privateers bearing commiſſions iſſued by the governor of *North-Carolina*, previouſly to the 4th of *April*, 1777? And on what other principle could

could that reſolution be "tranſmitted to each of the United States, as a law in any prize cauſe, which may be depending or inſtituted in any of the courts therein, and to ſecure the condemnation of veſſels taken under ſuch commiſſions?" The very privateer that made the capture in queſtion, was commiſſioned by Congreſs; and the uſual bond was given by her owners to the Preſident of Congreſs: Could, then, a privateer acting under the commiſſion of Congreſs, be deemed to act under any other authority; or be governed by any other laws than thoſe which Congreſs had preſcribed? Had *New-Hampſhire* a right to erect courts for the condemnation of prizes made by veſſels commiſſioned by Congreſs, unleſs by the authority of Congreſs, and upon the terms of their reſolutions? 1795.

It is urged, however, that this is a caſe between citizens of the ſame country; and, therefore, not within the general principle: But we anſwer, that a citizen of *Maſſachuſetts* is a foreigner with regard to *New-Hampſhire*. The law of *New-Hampſhire*, reſpecting admiralty matters, paſſed in 1776, long before the articles of confederation were ratified; and 'till thoſe articles were ratified, there is no colour to alledge, that the citizens of one ſtate, were citizens of all the reſt. But, if Congreſs had a juriſdiction co-extenſive with the object, they are alone competent to modify or limit its exerciſe: and, when they reſerved to themſelves the appeal *in all caſes*, it is clear that they intended an appeal ſhould lie as well in caſes between citizens, as in caſes between citizens and foreigners;—from the verdict of a jury on matters of fact, as well as from the judgment of the court in matters of law. Nor can the municipal law of a ſtate, govern the queſtion of prize, or no prize, even between citizens; though it may regulate the diſtribution of prize money, for, in that reſpect, none but the citizens of the ſtate can be intereſted. In the caſe of the ſloop *Active*, all the ſtates but *Pennſylvania* voted originally that the deciſion ſhould be according to the law of nations, and not according to the municipal law of the ſtate; and although in the year 1784, ſix of the ſtates voted in ſupport of a different opinion; yet, it muſt be recollected that the hearing was then *ex parte*; Congreſs were evidently influenced by an apprehenſion of the conſequence of enforcing the decree of the court of appeals in that caſe againſt the State of *Pennſylvania*, as they have been in this caſe againſt the State of *New-Hampſhire*; and the whole proceeding was marked and diſcoloured with want of candor.

II. ERROR:—The death of *Doane*, under the circumſtances that appear on the record, and the law and practice of the court, did not abate the appeal. Every intendment will be made to ſupport a judgment. 1 *Will.* 2. 2 *Stra.* 1180. Regularly, indeed,

1795. deed, a ſuit abates by the death of the party; but the law is not invariably ſo, where the party dying is immaterial to the cauſe. 1 *Eq. Abr.* 1. The proceeding in the preſent caſe was *in rem*; and, therefore, the life of the party was not material. *Ayliff.* The court refuſed to examine into an abatement by death, in a bill of review for that purpoſe, the decree being made twenty years before. 1 *Cha. Ca.* 122. Nor is there any abatement by death of parties in a ſpiritual court. 2 *Roll. Rep.* 18. 2 *Lev.* 6. And this being a court of civil law, the principle equally applies. The preſent record ſtates that the appellant and appellee appeared by their advocates; and if any error in this reſpect occurred in the court of appeals, a court of review was eſtabliſhed by Congreſs, who might have examined and corrected it; there is no court that has now a juriſdiction to do ſo; though the error, if it exiſted, ſhould have been aſſigned, and relied on, in the Circuit Court for the diſtrict of *New-Hampſhire*. But, after all, the court may reject that part of the libel, which ſtates the adminiſtration to have been committed, prior to the time of pronouncing the judgment of the Court of Appeals. 2 *Vin.* 404. *pl.* 4 *(bis.)* *pl.* 5. *pl.* 7. *pl.* 9. *pl.* 11. It is not ſaid by the record that *Doane* was then dead, but merely that adminiſtration had been granted on his eſtate, which is only evidence of his death. On this point alſo were cited *Brook. Tit. Judgment* 113. *Sal.* 8. *pl.* 21. *Salk.* 33. *pl.* 6. *Carth.* 118.

III. EREOR:—The argument in oppoſition to this aſſignment of errors, has been anticipated in diſcuſſing the firſt Error.

IV. ERROR:—That the Circuit Court gave *damages*, whereas the judgment of the Court of Appeals was for *reſtitution*, is not a valid objection. If the Court of Appeals had attached the party, damages muſt have been paid before he would have been diſcharged:—damages are the ſubſtance of the whole proceeding. Nor is it exceptionable, that damages are not expreſsly prayed for by the libel; ſince that is neceſſarily included in the prayer for general relief.

V. ERROR:—That the Circuit Court did not enquire into the merits of the original decree, is ſurely no legal objection. There were no merits out of the record, brought before the court. If any facts had been offered and rejected, a bill of exceptions might have been taken. Nor can this court enquire into the facts. The law gives *an appeal* from the Diſtrict to the Circuit Court; but a *writ of error* only lies from the Circuit Court to the Supreme Court. On a writ of Error, no extrinſic fact can be enquired into; and the diverſity of the proceſs proves, that it was the intent of the Legiſlature to preclude ſuch an enquiry.

VI.

VI. ERROR:—The damages, it is contended, ought to have been ſeveral and diſtributive, according to the actual receipt of the different parties; and it is ſaid that a mere agent ought not to be made reſponſible, after he has *bona fide* paid over the money; but the injury was done by the joint act of the original Libellants; *Wentworth's* paying away the money which he had received as agent, is denied and traverſed in the replication; he muſt have had full notice of the appeal, and, therefore, acted at his own peril. If, however, the judgment of the Circuit Court ſhould be deemed erroneous in the mode of decreeing damages, this court will correct it, and give ſuch a judgment as the court below ought to have done. On this point the following authorities were cited: *Doug.* 577. 1 *Dall. Rep.* 95. 1795.

VII. ERROR:—The anſwer to this aſſignment of error was anticipated in the courſe of the preceding anſwers.

VIII. ERROR:—That the Circuit Court had juriſdiction as a Court of Admiralty, has been decided in the caſe of *Glaſs et al v. the ſloop Betſey**.

On the 24th of *Feb.* 1795, the Judges delivered their opinions *ſeriatim.*

PATERSON, *Juſtice*:—This cauſe has been much obſcured by the irregularity of the pleadings, which preſent a medley of procedure, partly according to the common, and partly according to the civil, law. We muſt endeavour to extract a ſtate of the caſe from the Record, Documents, and Acts, which have been exhibited.

[Here the Judge delivered the hiſtorical narrative of the cauſe, with which this report is introduced, and then proceeded as follows:]

PATERSON, *Juſtice.* I have been particular in ſtating the caſe, and giving an hiſtorical narrative of the tranſaction, in order that the grounds of deciſion may be fully underſtood. The pleadings conſiſt of a heap of materials, thrown together in an irregular manner, and, if examined by the ſtrict rules of common law, cannot ſtand the teſt of legal criticiſm. We are, however, to view the proceedings as before a Court of Admiralty, which is not governed by the rigid principles of common law. Order and ſyſtematic arrangement are no ſmall beauties in juridical proceedings; and, whatever may be ſaid to the contrary, it will, on fair inveſtigation, appear, that good pleading is founded on ſound logic, and good ſenſe.

In the diſcuſſion of the cauſe, ſeveral queſtions have been agitated; ſome of which, involving conſtitutional points, are of great importance.

The juriſdiction of the Commiſſioners of Appeals has been queſtioned.

The

* See *ant. p.* 4.

1795. The jurisdiction of the Court of Appeals has been questioned.

These jurisdictions turning on the competency of Congress, it has been questioned, whether that body had authority to institute such tribunals.

And, lastly, the jurisdiction of the District Court of *New Hampshire* has been questioned. In every step we take, the point of jurisdiction meets us.

I. The question first in order, is, whether the Commissioners of Appeals had jurisdiction, or, in other words, whether Congress, before the ratification of the articles of confederation, had authority to institute such a tribunal, with appellate jurisdiction in cases of prize?

Much has been said respecting the powers of Congress. On this part of the subject the counsel on both sides displayed great ingenuity, and erudition, and that too in a stile of eloquence equal to the magnitude of the question. The powers of Congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme, and controuling council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must enquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government: Congress conducted all military operations both by land and sea: Congress emitted bills of credit, received and sent ambassadors, and made treaties: Congress commissioned privateers to cruize against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of *America*. In Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace. In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing. If it be asked, in whom, during our revolution war, was lodged, and by whom was exercised this supreme authority? No one will hesitate for an answer. It was lodged in, and exercised by, Congress; it was there, or no where; the states individually did not, and, with safety, could not exercise it. Disastrous would have been the issue of the contest, if the States, separately, had exercised the powers of war. For, in such case, there would have been as many supreme

preme wills as there were ſtates, and as many wars as there were wills. Happily, however, for *America*, this was not the caſe; there was but one war, and one ſovereign will to conduct it. The danger being imminent, and common, it became neceſſary for the people or colonies to coaleſce and act in concert, in order to divert, or break, the violence of the gathering ſtorm; they accordingly grew into union, and formed one great political body, of which Congreſs was the directing principle and ſoul. As to war and peace, and their neceſſary incidents, Congreſs, by the unanimous voice of the people, exerciſed excluſive juriſdiction, and ſtood, like Jove, amidſt the deities of old, paramount, and ſupreme. The truth is, that the States, individually, were not known nor recognized as ſovereign, by foreign nations, nor are they now; the States collectively, under Congreſs, as the connecting point, or head, were acknowledged by foreign powers as ſovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exerciſe of which other ſovereigns would be more immediately intereſted; ſuch, for inſtance, as the rights of war and peace, of making treaties, and ſending and receiving ambaſſadors. Beſides, every body muſt be amenable to the authority under which he acts. If he accept from Congreſs a commiſſion to cruize againſt the enemy, he muſt be reſponſible to them for his conduct. If, under colour of ſuch commiſſion, he had violated the law of nations, Congreſs would have been called upon to make atonement and redreſs. The perſons who exerciſe the right or authority of commiſſioning privateers, muſt, of courſe, have the right or authority of examining into the conduct of the officer acting under ſuch commiſſion, and of confirming or annulling his tranſactions and deeds. In the preſent caſe, the Captain of the *M'Clary* obtained his commiſſion from Congreſs; under that commiſſion he cruiſed on the high ſeas, and captured the *Suſanna*; and for the legality of that capture he muſt ultimately be reſponſible to Congreſs, or their conſtituted authority. This reſults from the nature of the thing; and, beſides, was expreſsly ſtipulated on the part of Congreſs. The authority exerciſed by Congreſs in granting commiſſions to privateers, was approved and ratified by the ſeveral colonies or ſtates, becauſe they received and filled up the commiſſions and bonds, and returned the latter to Congreſs—*New-Hampſhire* did ſo, as well as the reſt. 1795.

Another circumſtance, worthy of notice, is the conduct of *New-Hampſhire*, by her Delegate in Congreſs, in the caſe of the ſloop *Active*. *Acts of Congreſs*, 6*th March*, 1779.—By this deciſion, *New-Hampſhire* concurred in binding the other ſtates. Did ſhe not alſo bind herſelf? Before the articles of confederation were ratified, or even formed, a league of ſome kind ſubſiſted

1795. fiſted among the ſtates; and, whether that league originated in compact, or a ſort of tacit conſent, reſulting from their ſituation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial. The States, when in Congreſs, ſtood on the floor of equality; and, until otherwiſe ſtipulated, the majority of them muſt controul. In ſuch a confederacy, for a ſtate to bind others, and not, in ſimilar caſes, be bound herſelf, is a ſoleciſm. Still, however, it is contended, that *New-Hampſhire* was not bound, nor Congreſs ſovereign as to war and peace, and their incidents, becauſe they reſiſted this ſupremacy in the caſe of the *Suſanna*. But I am, notwithſtanding, of opinion, that New-Hampſhire was bound, and Congreſs ſupreme, for the reaſons already aſſigned; and that ſhe continued to be bound, becauſe ſhe continued in the confederacy. As long as ſhe continued to be one of the federal ſtates, it muſt have been on equal terms. If ſhe would not ſubmit to the exerciſe of the act of ſovereignty contended for by Congreſs, and the other ſtates, ſhe ſhould have withdrawn herſelf from the confederacy.

In the Reſolutions of Congreſs of the 6th of *March*, 1779, is contained a courſe of reaſoning, which, in my opinion, is cogent and concluſive. 5 *Jour. Cong.* 86, 87, 88, 89, 90.

"The committee, conſiſting of Mr. *Floyd*, Mr. *Ellery*, and Mr. *Burke*, to whom was referred the report of the committee on appeals of January 19th, 1779, having, in purſuance of the inſtructions to them given, examined into the cauſes of the refuſal of the Judge of the Court of Admiralty for the State of *Pennſylvania*, to carry into execution the decree of the Court or committee of appeals, report,

"That on a libel in the court of admiralty for the ſtate of Pennſylvania in the caſe of the ſloop Active, the jury found a verdict in the following words, viz. "one fourth of the nett proceeds of the ſloop Active and her cargo to the firſt claimants, three fourths of the nett proceeds of the ſaid ſloop and her cargo to the libellant and the ſecond claimant, as per agreement between them; which verdict was confirmed by the judge of the court, and ſentence paſſed thereon. From this ſentence or judgment and verdict, an appeal was lodged with the ſecretary of Congreſs, and referred to the committee appointed by Congreſs "to hear and determine finally upon all appeals brought to Congreſs," from the Courts of Admiralty of the ſeveral States:

"That the ſaid committee, after ſolemn argument and full hearing of the parties by their advocates, and taking time to conſider thereof, proceeded to the publication of their definitive ſentence or decree, thereby reverſing the ſentence of the Court of Admiralty, making a new decree, and ordering proceſs to iſſue

iſſue out of the Court of Admiralty for the ſtate of Pennſylvania to carry this their decree into execution: 1795.

"That the judge of the Court of Admiralty refuſed to carry into execution the decree of the ſaid committee on appeals, and has aſſigned as the reaſon of his refuſal, that an act of the Legiſlature of the ſaid State has declared, that the finding of a jury ſhall eſtabliſh the facts in all trials in the Courts of Admiralty, without re-examination or appeal, and that an appeal is permitted only from the decree of the judge:

"That having examined the ſaid act, which is entitled, "an act for eſtabliſhing a Court of Admiralty," paſſed at a ſeſſion which commenced on the 4th of Auguſt, 1778, the committee find the following words, viz. "the finding of a jury ſhall eſtabliſh the facts, without re-examination, or appeal," and in the ſeventh ſection of the ſame act the following words, viz. "in all caſes of captures an appeal from the decree of the Judge of Admiralty of this State, ſhall be allowed to the Continental Congreſs, or ſuch perſon or perſons as they may from time to time appoint for hearing and trying appeals."

"That although Congreſs, by their reſolution of *November* 25th, 1775, recommended it to the ſeveral legiſlatures, to erect courts for the purpoſe of determining concerning captures, and to provide that all trials in ſuch caſes be had by a jury, yet it is provided, that in all caſes an appeal ſhall be allowed to Congreſs, or to ſuch perſon or perſons as they ſhall appoint for the trial of appeals:" whereupon,

"*Reſolved*, That Congreſs, or ſuch perſon or perſons as they appoint, to hear and determine appeals from the courts of Admiralty, have neceſſarily the power to examine as well into deciſions on facts as deciſions on the law, and to decree finally thereon, and that no finding of a jury in any court of Admiralty, or court for determining the legality of captures on the high ſeas, can or ought to deſtroy the right of appeal, and the re-examination of the facts reſerved to Congreſs:

"That no act of any one ſtate can or ought to deſtroy the right of appeals to Congreſs, in the ſenſe above declared:

"That Congreſs is by theſe *United States*, inveſted with the ſupreme ſovereign power of war and peace:

"That the power of executing the law of nations is eſſential to the ſovereign ſupreme power of war and peace:

"That the legality of all captures on the high ſeas muſt be determined by the law of nations:

"That the authority ultimately and finally to decide on all matters and queſtions touching the law of nations, does reſide and is veſted in the ſovereign ſupreme power of war and peace;

"That

1795. "That a controul by appeal is neceſſary, in order to compel a juſt and uniform execution of the law of nations.

"That the ſaid controul muſt extend as well over the deciſions of juries, as judges, in courts for determining the legality of captures on the ſea; otherwiſe the juries would be poſſeſſed of the ultimate ſupreme power of executing the law of nations in all caſes of captures, and might, at any time, exerciſe the ſame in ſuch manner, as to prevent a poſſibility of being controuled; a conſtruction which involves many inconveniencies and abſurdities, deſtroys an eſſential part of the power of war and peace entruſted to Congreſs, and would diſable the Congreſs of the *United States*, from giving ſatisfaction to foreign nations complaining of a violation of neutralities, of treaties, or other breaches of the law of nations, and would enable a jury, in any one ſtate, to involve the *United States* in hoſtilities; a conſtruction, which for theſe and many other reaſons, is inadmiſſible:

"That this power of controuling by appeal, the ſeveral admiralty juriſdictions of the States, has hitherto been exerciſed by Congreſs, by the medium of a committee of their own members:

"*Reſolved*, That the committee before whom was determined the appeal from the court of Admiralty for the State of *Pennſylvania*, in the caſe of the ſloop *Active*, was duly conſtituted and authoriſed to determine the ſame:"

The yeas and nays being taken, it appears that the States of *New Hampſhire*, *Maſſachuſetts-Bay*, *Rhode-Iſland*, *Connecticut*, *New-York*. *Maryland*, *Virginia*, *North-Carolina*, *South-Carolina*, and *Georgia*, voted unanimouſly in the affirmative: the State of *Pennſylvania* unanimouſly in the negative; and Mr. *Witherſpoon*, who was alone from *New-Jerſey*, voted alſo in the negative.

The Congreſs then voted as follows, viz.

"*Reſolved*, That the ſaid committee had competent juriſdiction to make thereon a final decree, and therefore their decree ought to be carried into execution."

The yeas and nays being taken on this reſolution, it appears, that *New-Hampſhire*, *Maſſachuſetts-Bay*, *Rhode-Iſland*, *Connecticut*, *New-York*, *Maryland*, *Virginia*, *North-Carolina*, *South-Carolina*, and *Georgia*, voted unanimouſly in the affirmative; *Pennſylvania* unanimouſly in the negative; and Mr. *Witherſpoon*, who was alone from *New-Jerſey*, voted on this occaſion in the affirmative.

The Congreſs then reſolved as follows, viz.

"*Reſolved*, That the General Aſſembly of the State of *Pennſylvania*, be requeſted to appoint a committee, to confer with a committee of Congreſs, on the ſubject of the proceedings relative

relative to the ſloop *Active*, and the objections made to the execution of the decree of the committee on appeals, to the end that proper meaſures may be adopted for removing the ſaid obſtacles; and that a committee of three be appointed to hold the ſaid conference, with the committee of the General Aſſembly of *Pennſylvania*: 1795.

"The members choſen, Mr. *Paca*, Mr. *Burke*, and Mr. *R. H. Lee*."

I ſhall cloſe this head of diſcourſe with obſerving, that it is with diffidence I have ventured to give an opinion on a queſtion ſo novel and intricate, and reſpecting which, men, eminent for their talents, their literary attainments, and ſkill in juriſprudence, have been divided in ſentiment. The opinion, however, which has been given, is the reſult of conviction; if wrong, it is the error of the head, and as ſuch will carry its apology with it.

II. Whether, after the articles of confederation were ratified, the Court of Appeals had juriſdiction of the ſubject matter?

However problematical the opinion, which has been delivered on the preceding point, may be, I apprehend, that little doubt or difficulty can ariſe on the preſent queſtion. By the 9th article of the Confederation, the *United States*, in Congreſs aſſembled, are veſted, among other things, with the ſole and excluſive power of eſtabliſhing rules for deciding in all caſes, what captures on land or water ſhall be legal, and in what manner prizes, taken by land or naval forces in the ſervice of the *United States*, ſhall be divided or appropriated; of granting letters of marque and repriſal in times of peace; appointing courts for the trial of piracies and felonies committed on the high ſeas, and eſtabliſhing courts for receiving and determining finally, appeals in all caſes of captures.

The Court of Appeals, in *September* 1783, decided upon the point of juriſdiction either directly, or incidentally; for, after a full hearing, they decreed that the ſentences paſſed by the Superior and Inferior Courts of *New-Hampſhire* ſhould be reverſed and annulled, and the property be reſtored. This decree being made by a court, conſtitutionally eſtabliſhed, of competent authority, and the higheſt juriſdiction, is concluſive and final. It cannot be opened and inveſtigated; for, neither this court, nor any other, can, in a collateral way, review the proceedings of a tribunal, which had juriſdiction of the ſubject-matter. The Court of Appeals was competent to the deciſion; they have adjudicated as well on the juriſdiction as the merits of the cauſe, and we muſt ſuppoſe that they have acted properly. This alſo is an anſwer as to irregularities, if any there were, which may have taken place in the proceedings before

1795. before the Court of Appeals, or in the mode of removing the cauſe before them. This court cannot take notice of irregularities in the proceedings, or error in the deciſion, of the Court of Appeals. The queſtion is at reſt; it ought not to be again diſturbed.

III. Whether the Diſtrict Court of *New-Hampſhire* had juriſdiction; or, in other words, whether the libel exhibited before that court, was the proper remedy, or mode of carrying into execution, either ſpecifically, or by way of damages, the decree of the Court of Appeals?

On this point I entertain no doubts. Recurrence to facts will anſwer the queſtion. The exiſtence of the Court of Appeals terminated with the old government; this alſo was the caſe with the ſubordinate Court of Admiralty in the State of *New-Hampſhire*. The property was not reſtored to the libellants, nor were they compenſated in damages; of courſe the decree in their favour remains unſatisfied. They had no remedy at common law; they had none in equity; the only forum competent to give redreſs is the Diſtrict Court of *New-Hampſhire*, becauſe it has admiralty juriſdiction. There they applied, and, in my opinion, with great propriety.

Judges may die, and courts be at an end; but juſtice ſtill lives, and, though ſhe may ſleep for a while, will eventually awake, and muſt be ſatisfied.

Having diſcuſſed the preliminary queſtions relative to juriſdiction, we ſhall now conſider the proceedings in the Circuit Court of *New-Hampſhire*. And here the firſt queſtion is, whether by the death of *Eliſha Doane*, before the judgment rendered in the court of appeals, that judgment is not avoided? The death of *Doane* does not appear on the record of the proceedings before the court of appeals; it is in evidence from the certificate of the judge of probates, which is annexed to the record tranſmitted from the Circuit Court of *New-Hampſhire*. Many anſwers have been given to this queſtion; ſome of which are cogent as well as plauſible. On this ſubject, it will be ſufficient to obſerve, that admitting the death of *Doane*, and that it can be taken notice of in this court, it is unavailing, becauſe the proceedings in a court of admiralty are *in rem*. The ſentence of a court of admiralty, or of appeal in queſtions of prize, binds all the world, as to every thing contained in it, becauſe all the world are parties to it. The ſentence, ſo far as it goes, is concluſive to all perſons.

The moſt formidable objections have been levelled againſt the damages.

1. It is ſaid, that the damages ought not to have been given, becauſe they were not prayed. The anſwer to this objection is

is satisfactory—the prayer is for general relief, and therefore sufficient. 1795.

2. If any damages ought to be given, yet none ought to have been awarded against *George Wentworth*, because he was an agent, and paid the money over under the decree of the Court of *New Hampshire*.

If any Agent pay over, after notice, he pays wrongfully, and shall not be excused. In this case *George Wentworth* was a party to the suit, he appeared as one of the Libellants, and must be liable to all the legal consequences resulting from such a situation. As a party, he was before the court, and privy to the appeal, which was made in due season. The appeal did, from the moment it was made, suspend the execution of the decree, and that whether it was received or not;* especially in cases like the present, where *George Wentworth* was a party to the suit, before the court, and had notice of its having been tendered or made. In such a predicament, he ought not to have paid over; but should have awaited the ultimate decision of the Court of Appeals. If he paid, it was at his peril; he took the risk upon himself, and in case of undue payment, became liable.

It has been said, that an inhibition should have been issued, and that without it the appeal did not suspend the execution of the decree. The writ of inhibition is a proper and necessary writ, not because it suspends the effect of the decree, for that is already done by the appeal; but because it enables the court of appellate jurisdiction, in case of disobedience, to punish the inferior court as being in contempt. The appeal has not this effect, because it is the act of the party, and not of the superior court.

A monition, it is said, ought to have been addressed to the Appellees to enforce their appearance before the Court of appellate jurisdiction. The answer is, that *George Wentworth*, as well as the others, did appear both before the Court of Commissioners and the Court of Appeals. If a defect, and inquirable into by this court, it is cured by appearance.

In short, *George Wentworth* was a party to the suit, present in court, and had notice of the appeal. If, in such a situation, he undertook to distribute the proceeds, it was at his own risk: and in case of reversal, he made himself liable.

I have doubts how far the court below could inquire into the question of agency and payment over, especially as the payment is said to have been made, previously to the argument before the Court of Appeals, or even the Court of Commissioners. The decree is for restoration. If the Court of Appeals had issued process to carry their definitive sentence into effect, or had

* 2 *Dom.* 686.

1795. had directed the Maritime Courts of *New Hampſhire* to have done ſo, would it, in the inſtance of *George Wentworth*, have been a legal juſtification to have ſaid, that he had delivered the property, or paid its proceeds, to the captors? Beſides, whatever could have been brought forward, by way of defence, in the Court of Appeals, ought there to have been urged and relied upon; and if the party has omitted to do ſo, he has ſlipt his opportunity, and is precluded from taking advantage thereof in future.

I know, that a diſtinction is made between foreign and domeſtic judgments; that the latter are concluſive, whereas the former are liable to inveſtigation. Be it ſo. But is the principle, upon which this diſtinction is founded, applicable to decrees, on queſtions of prize, in the higheſt Court of Admiralty, which, in ſuch caſes, is guided by the law of Nations, and not municipal regulations? If it is, it muſt be under very ſpecial circumſtances.

3. It is objected, that the damages awarded are joint; whereas they ought to have been ſeveral. This objection is a ſound one. But as the facts are ſpread on the record, it is in the power of the court to ſever the damages, and ſo to apportion them as to effectuate ſubſtantial juſtice. The damages ſhould have purſued and been admeaſured by the original decree, which directed, that one moiety of the proceeds ſhould be paid to the owners, and the other to the captors. *George Wentworth* received a moiety only; he is liable for that, and no more.

4. Another objection is, that intereſt has been calculated from a wrong period, to wit, from the 2d *October*, 1778; and therefore the decree of the Circuit Court is erroneous.

The Court of Appeals pronounced their definitive ſentence in *September* 1783; by which the judgments of the inferior and ſuperior Courts of *New Hampſhire* were reverſed, and reſtoration decreed; they alſo directed, that the parties ſhould pay their own coſts. I am of opinion, that intereſt ſhould have been computed from the day, on which the definitive ſentence of the Court of Appeals was pronounced. Of this there can be no doubt with reſpect to *John Penhallow* and the owners. Some doubts, however, have been entertained on this point with regard to *George Wentworth*. But for the reaſons, which have been aſſigned, he muſt be conſidered in the ſame ſituation as the others.

Arguments, deducible from the hardſhip of the caſe, have been advanced and inſiſted upon. It is hard, that *George Wentworth*, who was an agent, ſhould be made perſonally reſponſible. It is cruel, that *George Wentworth* ſhould be cut down by the colliſion of conflicting juriſdictions. But motives of commiſeration, from whatever ſource they flow, muſt not mingle

mingle in the adminiſtration of juſtice. Judges, in the exer- 1795.
ciſe of their functions, have frequent occaſions to exclaim, "*durum valde durum, ſed ſic lex eſt.*"

To conclude, the ſum of - - - £.5,895 14 10
appears, on the record, to be the aggregate value of the *Suſanna*, her cargo, &c.

On this ſum intereſt ſhould be calculated from 17th *September*, 1783, till 24th *October*, 1794, which will amount to - - - 3,920 13 4

Making in the whole - - - - £.9,816 8 2

Equal to 32,721 dollars and 36 cents. The one moiety whereof, being 16,360 dollars and 68 cents, I am of opinion, ſhould be paid by *John Penhallow* and the owners, and the other moiety by *George Wentworth*. The coſts in the courts below ſhould be divided in the ſame manner.

I am alſo of opinion, that the parties ſhould bear their reſpective coſts, which have ariſen on the proſecution of the appeal in this court.

IREDELL, *Juſtice*. This caſe, which is of ſo much novelty and importance, has been argued at the bar with very great ability on both ſides. I have liſtened with the moſt reſpectful attention to every thing that has been ſaid upon it, and the opinion, which I am now to deliver, is the reſult of the beſt conſideration which I have been able to beſtow on the ſubject.

The order in which it has appeared to me moſt convenient to arrange the different heads of enquiry is as follows:

1. Whether either of the decrees of *June*, 1779, or *September*, 1783, was originally valid?

2. If either of them was ſo, whether it was a decree which the Diſtrict Court of *New Hampſhire*, or the Circuit Court of *New Hampſhire*, acting ſpecially in this cauſe for the legal reaſon alledged, had authority to enforce, either by decreeing a ſpecific execution, or awarding damages for a non-performance of it?

3. Whether, if the Diſtrict or Circuit Court had ſuch an authority, it has been executed properly in this inſtance, under all the circumſtances of the caſe?

4. Whether, in caſe the Libellants were entitled to a decree in their favour, but it ſhall appear that the decree has been erroneous in reſpect to the relief given, either in the whole or in part, this court can rectify the decree, or order it to be rectified by the court below, or muſt affirm or reverſe in the whole?

Under the firſt head it will be proper previouſly to conſider if either of the decrees was final and concluſive, becauſe if that point ſhould be decided in the affirmative, it will render

1795. unneceſſary a deciſion of many important queſtions that otherwiſe ariſe in this cauſe. This previous point, however, cannot be decided on ſatisfactory principles, without in ſome meaſure tracing the origin of the general powers of Congreſs, from the time of the earlieſt exerciſe of their authority, to the period when definite and expreſs powers were ſolemnly and formally given to them by the articles of confederation. I ſhall therefore make a few preliminary obſervations on this ſubject, though I by no means think it material to go into a full detail.

Under the *Britiſh* government, and before the oppoſition to the meaſures of the Parliament of *Great Britain* became neceſſary, each Province in *America* compoſed (as I conceive) a body politic, and the ſeveral Provinces were no otherwiſe connected with each other, than as being ſubject to the ſame common ſovereign. Each Province had a diſtinct legiſlature, a diſtinct executive (ſubordinate to the king) a diſtinct judiciary and in particular the claim as to taxation, which began the conteſt, extended to a ſeparate claim of each province to raiſe taxes within itſelf; no power then exiſted, or was claimed, for any joint authority on behalf of all the Provinces to tax the whole. There were ſome diſputes as to boundaries, whether certain lands were within the bounds of one Province or another, but nobody denied that where the boundaries of any one Province could be aſcertained, all the permanent inhabitants within thoſe boundaries were members of the body politic, and ſubject to all the laws of it. When acts were paſſed by the Parliament of *Great Britain* which were thought unconſtitutional and unjuſt, and when every hope of redreſs by ſeparate applications appeared deſperate, then was conceived the noble idea, which laid the foundation of the preſent independence and happineſs of this country, (though independence was not then in contemplation) of forming a common council to conſult for the common welfare of the whole, ſo far as an oppoſition to the meaſures of *Great Britain* was concerned. In order to compoſe this common council each Province choſe for itſelf, in its own way, and by its own authority, without any previous concerted plan of the whole, deputies to attend at a general meeting to be held in this city. Some appointed by their Aſſemblies; others by Conventions; ſome perhaps in other modes; but, in whatever way the appointment was made, it was notoriouſly done with the hearty conſent and approbation of the great body of the people in each Province, and therefore the appointment was unexceptionable to all thoſe who thought the oppoſition juſt, and a union of the whole in the meaſures of oppoſition neceſſary. Each Province even appointed as many or as few deputies as it pleaſed, at its own diſcretion, which was not objected to, becauſe the Members of Congreſs did not vote

vote individually, but the votes given in Congreſs were by Provinces, as they afterwards were (ſubſequent to the declaration of Independence, and until the preſent conſtitution of the *United States* was formed) by States. 1795.

The powers of Congreſs at firſt were indeed little more than adviſory; but, in proportion as the danger increaſed, their powers were gradually enlarged, either by expreſs grant, or by implication ariſing from a kind of indefinite authority, ſuited to the unknown exigencies that might ariſe. That an undefined authority is dangerous, and ought to be entruſted as cautiouſly as poſſible, every man muſt admit, and none could take more pains, than Congreſs for a long time did, to get their authority regularly defined by a ratification of the articles of confederation. But that previouſly thereto they did exerciſe, with the acquieſcence of the States, high powers of what I may, perhaps, with propriety for diſtinction, call *external ſovereignty*, is unqueſtionable. Among numerous inſtances that might be given of this, (and which were recited very minutely at the bar) were the treaties of *France* in 1778, which no friend to his country at the time queſtioned in point of authority, nor has been capable of reflecting upon ſince without gratitude and ſatisfaction. Whether among theſe powers comprehended within their general authority, was that of inſtituting courts for the trial of all prize cauſes, was a great and awful queſtion; a queſtion that demanded deep conſideration, and not perhaps ſuſceptible of an eaſy deciſion. That in point of prudence and propriety it was a power moſt fit for Congreſs to exerciſe, I have no doubt. I think *all prize cauſes* whatſoever ought to belong to the national ſovereignty. They are to be determined by the law of nations. A prize court is, in effect, a court of all the nations in the world, becauſe all perſons, in every part of the world, are concluded by its ſentences, in caſes clearly coming within its juriſdiction. Even in the caſe of *citizen* and *citizen* I do not think it a proper ſubject for mere municipal regulation, becauſe as was obſerved at the bar, a citizen may make a colourable claim, which the court may not be able to detect, and yet a foreigner be fatally injured by it. In caſe of a *bona fide* claim, it may appear to be good by the proofs offered to the court, but another perſon living at a diſtance may have a ſuperior claim, which he has no opportunity to exhibit. It is true a general monition iſſues, and this is conſidered notice to all the world, but though this be the conſtruction of the law from the neceſſity of the caſe, it would be abſurd to infer in fact that all the world had actual notice, and therefore no ſuperior claimant to the one before the court could poſſibly exiſt. The court, therefore, can never know with certainty whether citizens only are intereſted in the enquiry. But the words

"*citizen*

1795. "*citizen* and *citizen*" in this caſe are very ill applied to the parties in queſtion, they not having been citizens of the ſame State, the captors having been citizens of *New Hampſhire*, and the claimant a citizen of *Maſſachuſetts-Bay*. It never was conſidered that before the actual ſignature of the articles of confederation a citizen of one State was to any one purpoſe a citizen of another. He was to all ſubſtantial purpoſes as a Foreigner to their forenſic juriſprudence. If rigorous law had been enforced, perhaps he might have been deemed an *alien*, without an expreſs proviſion of the State to ſave him. And as an unjuſt deciſion upon the law of nations, in the caſe of a Foreigner to all the States, might, if redreſs had not been given, have ultimately led to a foreign war, an unjuſt deciſion on the ſame law in one State, to the prejudice of a citizen of another State, might have ultimately led, if redreſs had not been given, to a civil war, an evil much the more dreadful of the two. I have made theſe obſervations merely as to the propriety that this power ſhould have been delegated, and therefore to ſhew that if it was aſſumed without adequate authority, it was not an arbitrary and unnatural aſſumption of a power, that ought excluſively to belong to a ſingle State; but by no means with a view to argue, that becauſe it was *proper* to be given, therefore it was *actually* given, a poſition which, as it would lead to dangerous and inadmiſſible conſequences, cannot be the ground of a legitimate argument.

Some of the arguments at the bar, if puſhed to an extreme, would tend to eſtabliſh, that Congreſs had unlimited power to act at their diſcretion, ſo far as the purpoſes of the war might require; and it was even ſaid, that the *Jus Belli* never was in any one of the States, and therefore it could not be delegated by any State to Congreſs. My principles on this ſubject are totally different from thoſe which were the foundation of this opinion, and as it is a point of no ſmall importance, and I find on this occaſion, as I have formerly done on others, conſiderable miſtakes (as I conceive) by very able men, owing to a miſapprehenſion of terms, I will endeavour to ſtate my own principles on the ſubject with ſo much clearneſs, that whether my opinion be right or wrong, it may at leaſt be underſtood what the opinion really is.

If Congreſs, previous to the articles of confederation, poſſeſſed any authority, it was an authority, as I have ſhewn, derived from the people of each Province in the firſt inſtance. When the obnoxious acts of Parliament paſſed, if the people in each Province had choſen to reſiſt ſeparately, they undoubtedly had equal right to do ſo, as to join in general meaſures of reſiſtance with the people of the other Provinces, however unwiſe and deſtructive ſuch a policy might, and undoubtedly would

would have been. If they had purſued this ſeparate ſyſtem, and afterwards the people of each Province had reſolved that ſuch Province ſhould be a free and independent State, the State from that moment would have become poſſeſſed of all the powers of ſovereignty internal and external, (viz. the excluſive right of providing for their own government, and regulating their intercourſe with foreign nations) as completely as any one of the ancient Kingdoms or Republics of the world, which never yet had formed, or thought of forming, any ſort of Federal union whatever. A diſtinction was taken at the bar between *a ſtate* and *the people of the ſtate.* It is a diſtinction I am not capable of comprehending. By a *State* forming a Republic (ſpeaking of it as a *moral perſon*) I do not mean the Legiſlature of the State, the Executive of the State, or the Judiciary, but *all the citizens which compoſe that State, and are, if I may ſo expreſs myſelf, integral parts of it; all together forming a body politic.* The great diſtinction between Monarchies and Republics (at leaſt our Republics) in general is, that in the former the monarch is conſidered as the ſovereign, and each individual of his nation as ſubject to him, though in ſome countries with many important ſpecial limitations: This, I ſay, is generally the caſe, for it has not been ſo univerſally. But in a Republic, all the citizens, as ſuch, are equal, and no citizen can rightfully exerciſe any authority over another, but in virtue of a power conſtitutionally given by the whole community, and ſuch authority when exerciſed, is in effect an act of the whole community which forms ſuch body politic. In ſuch governments, therefore, the ſovereignty reſides in the great body of the people, but it reſides in them not as ſo many diſtinct individuals, but in their politic capacity only. Thus A. B. C. and D. citizens of *Pennſylvania*, and as ſuch, *together with all the citizens of Pennſylvania*, ſhare in the ſovereignty of the State. Suppoſe a State to conſiſt exactly of the number of 100,000 citizens, and it were practicable for all of them to aſſemble at one time and in one place, and that 99,999 did actually aſſemble: The State would not be in fact aſſembled. Why? Becauſe the ſtate in fact is compoſed of *all* the citizens, not of *a part* only, however large that part may be, and one is wanting. In the ſame manner as 99l. is not a hundred, becauſe one pound is wanting to complete the full ſum. But as ſuch exactneſs in human affairs cannot take place, as the world would be at an end, or involved in univerſal maſſacre and confuſion, if entire unanimity from every ſociety was required; as the aſſembling in large numbers, if practicable as to the actual meeting of all the citizens, or even a conſiderable part of them, could be productive of no rational reſult, becauſe there could be no general debate, no conſultation of the whole, nor

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1795. of conſequence a determination grounded on reaſon and reflexion, and a deliberate view of all the circumſtances neceſſary to be taken into conſideration, mankind have long practiſed (except where ſpecial exceptions have been ſolemnly adopted) upon the principle, that *the majority ſhall bind the whole*, and in large countries, at leaſt, that repreſentatives ſhall be choſen to act on the part of the whole. But when they do ſo, they decide for the whole, and not for themſelves only. Thus, when the legiſlature of any ſtate paſſes a bill by a majority, competent to bind the whole, it is an act of the whole Aſſembly, not of the majority merely. So when this court gives a judgment by the opinion of a majority, it is the judgment, in a legal ſenſe, of the whole court. So I conceive, when any law is paſſed in any ſtate, in purſuance of conſtitutional authority, it is a law of the whole ſtate acting in its legiſlative capacity; as are, alſo, executive and judiciary acts conſtitutionally authoriſed, acts of the whole ſtate in its executive or judiciary capacity, and not the perſonal acts alone of the individuals, compoſing thoſe branches of government. The ſame principles apply as to legiſlative, executive, or judicial acts of the *United States*, which are acts of the people of the *United States*, in thoſe reſpective capacities, as the former are of the people of a ſingle ſtate. Theſe principles have long been familiar in regard to the exerciſe of a conſtitutional power as to treaties. Theſe are deemed the treaties of the two nations, not of the perſons only, whoſe authority was actually employed in their formation. There is not one principle that I can imagine which gives ſuch an effect as to treaties, that has not ſuch an operation on any other legitimate act of government, all powers being equally derived from the ſame fountain, all held equally in truſt, and all, when rightfully exerciſed, equally binding upon thoſe from whom the authority was derived.

I conclude, therefore, that every particle of authority which originally reſided either in Congreſs, or in any branch of the ſtate governments, was derived from the people who were permanent inhabitants of each province in the firſt inſtance, and afterwards became citizens of each ſtate; that this authority was conveyed by each body politic ſeparately, and not by all the people in the ſeveral provinces, or ſtates, jointly, and of courſe, that no authority could be conveyed to the whole, but that which previouſly was poſſeſſed by the ſeveral parts; that the diſtinction between *a ſtate* and *the people of a ſtate* has in this reſpect no foundation, each expreſſion in ſubſtance meaning the ſame thing; conſequently, that one ground of argument at the bar, tending to ſhew the ſuperior ſovereignty of Congreſs, in the inſtance in queſtion, was not tenable, and therefore that upon that ground the exerciſe of the authority in queſtion can not be ſupported.

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I have already, however, ſtated my opinion, that from the nature of our political ſituation, it was highly reaſonable and proper that Congreſs ſhould be poſſeſſed of ſuch an authority, and this is a conſideration of no ſmall weight to induce an inference, that they actually poſſeſſed it when their powers were ſo indifinite, and when it ſeems to have been the ſenſe of all the ſtates, that Congreſs ſhould poſſeſs all the incidents to external ſovereignty, or, in other words, the power of war and peace, ſo far as other nations were concerned, though the ſtates in ſome particulars differed, as to the conſtruction of the general powers given for that purpoſe. Two principles appear to me to be clear. 1. The authority was not poſſeſſed by Congreſs, unleſs given by all the ſtates. 2. If once given, no ſtate could, by any act of its own, diſavow and recall the authority previouſly given, without withdrawing from the confederation. In the caſe of the *Active*, ten ſtates out of twelve recognized the authority, *New-Hampſhire* voting in ſupport of it. This was in 1779, long after the act of *New-Hampſhire* was paſſed, which has given occaſion to the controverſy in this cauſe, and in the ſame year when the ſecond act of *New-Hampſhire* was paſſed, which allowed an appeal to Congreſs in caſes (as the act expreſſed it) "wherein any ſubject or "ſubjects of any foreign nation or ſtate, in amity with this "and the *United States* of *America*, ſhould in due form of law, "claim the whole, or any part of the veſſel and cargo in diſ-"pute." The reſolution of Congreſs was dated the 6th *March*, 1779; the act of *New-Hampſhire* in *November* following. The vote of the delegates of *New-Hampſhire*, in the caſe of the *Active*, would not, indeed, be equivalent to a clear grant of the power, but it is a reſpectable ſupport of the conſtruction contended for by the defendants in error. It has been properly obſerved, that a court cannot by its own deciſion, give itſelf juriſdiction where it had none before; but if courts are ſo conſtituted that one is neceſſarily ſuperior to another, the deciſion of the ſuperior muſt, to be ſure, prevail. This, perhaps, is not concluſive as to the court of commiſſioners, becauſe it cannot be decided whether it was in fact the ſuperior court in reſpect to *New-Hampſhire*, without deciding whether it was conſtitutionally ſo in virtue of power from all the ſtates. This point it would be now neceſſary for this court to decide, if it were not for the deciſion of the court of appeals in 1783, a court of acknowledged prize juriſdiction, eſtabliſhed in virtue of expreſs authority from all the ſtates (*New-Hampſhire* included) and made a court in the laſt reſort as to all prize cauſes, or in other words (as expreſſed in the article of confederation itſelf) *in all caſes of captures.* And the deciſion of this court on the ſubject of the two contending juriſdictions, I conſider

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1795. conſider to be final and concluſive, for the following reaſons.

1. At the time the deciſion was given, it was the only court of final appellate juriſdiction, as to caſes of captures, in the United States. It ſeems therefore to follow neceſſarily, that *upon all queſtions of capture* their deciſion ſhould be final and concluſive, as much as the deciſion of this Court upon a writ of error from the Circuit Court, or any other branch of its juriſdiction, would be ſo.

2. To the ſuggeſtion at the bar, that the Court of appeals could have no retroſpect, ſeveral anſwers, I conceive, may be given.

1. It is taking for granted the very point in diſpute, that this deciſion was retroſpective. If Congreſs poſſeſſed this authority before, and the articles of Confederation amounted only to a ſolemn confirmation of it, it was in no manner retroſpective. It was in effect a continuance of the ſame court acting under an *expreſs*, inſtead (as before) of acting under an *implied* authority, and allowing the full benefit of an appeal regularly prayed, and rightfully enforced by the ſuperior tribunal, after an unwarranted diſſallowance by the inferior.

2. Whether the article in the confederation giving authority to this court as a ſuperior tribunal in *all caſes of capture*, did authoriſe them to receive appeals in caſes circumſtanced like this, was a point for them to decide; ſince it was a queſtion ariſing in a *caſe of capture*, of all which caſes (without any exception) they were conſtituted judges in the laſt reſort. The merits of their deciſion we ſurely cannot now enquire into, but *their authority to decide*, not being limited, there was no method, by applying to any other court, of correcting any error they might commit, if in reality they ſhould have committed any.

3. Whether their deciſion was right or wrong, yet nobody can deny that the juriſdiction of the commiſſioners was at leaſt doubtful; of courſe the Court of Appeals found a caſe then depending in the former court of the commiſſioners, after a preliminary, but not a final, determination, for ſuch I conſider it to have been. It was therefore a cauſe then *ſub judice*, and it being a caſe of capture and a queſtion of appeal, no other court on earth, but that, in my opinion, could decide it. And no objection can be urged in this caſe againſt the authority of ſuch a deciſion, or the propriety of its being final, but ſuch as may be urged againſt all courts in the laſt reſort, with reſpect to the merits of whoſe deciſions there may be eternal diſputes, but ſuch diſputes would be productive of eternal war, if ſome court had not authority to ſettle ſuch queſtions forever.

I, therefore, have not the ſmalleſt doubt, that the deciſion of the

the court in 1783, was final and concluſive as to the parties to the decree. And this point appears to me ſo plain, that I think it uſeleſs to take notice of any authorities quoted on either ſide, in relation to it, none of them, I conceive, in any manner contravening the concluſive quality of ſuch decrees upon the principles I have ſtated, and ſome of them clearly, and beyond all queſtion, ſupporting it. 1795.

The decree of *September*, 1783, being by me thus deemed final and concluſive, the next enquiry is,

Whether it was a decree which the Diſtrict Court of *New-Hampſhire*, or the Circuit Court of *New-Hampſhire* acting ſpecially in this cauſe for the legal reaſon alledged, had authority to enforce, either by decreeing a ſpecific execution, or awarding damages for a non-performance of it?

Upon this branch of the ſubject a few words will be ſufficient. The Diſtrict Court, by the act of Congreſs, hath the whole original juriſdiction in admiralty and maritime cauſes. Whatever doubt might otherwiſe have ariſen, the deciſion of this court upon the writ of error from *Maryland*, laſt *February*, fully eſtabliſhed, that this includes a prize juriſdiction, as well as other caſes of a maritime nature. I was not preſent when the deciſion was given; had I been ſo, I probably ſhould have concurred in it, becauſe the words, "all civil cauſes of admiralty and maritime juriſdiction," evidently include all maritime cauſes, whether peculiarly of admiralty juriſdiction or not; becauſe a queſtion of *prize* on the high ſeas is clearly of a maritime nature, and therefore the *Engliſh* diſtinction between an *inſtance* (which is ſtrictly an admiralty) court, and a *prize* court, does not apply to this caſe; more eſpecially as the Diſtrict Court having as large authority given to it in all maritime cauſes of a civil nature, as the conſtitution itſelf preſcribes. If that court does not poſſeſs ſuch an authority, no court can be inſtituted with powers adequate to that purpoſe, ſo that under the preſent conſtitution, there could be no prize juriſdiction at all; and the very tenure of all the judges (which is for good behaviour) naturally excludes the idea of a temporary and occaſional eſtabliſhment of any courts whatſoever. I mention theſe reaſons, not becauſe the authority of the caſe receives any additional ſanction from my opinion, but becauſe I was deſirous to take ſo favourable an opportunity of expreſſing my concurrence in a deciſion of ſo much importance.*

It was clearly ſhewn at the bar, that a Court of Admiralty in one nation, can carry into effect the determination of the Court of Admiralty of another. A Court of Prize being equally grounded on the law of nations as a Court of Admiralty, and proceeding alſo, as that does, on the principles of the civil law,

* See *Glaſs et al.* verſus *The Betſey et al. ante.*

1795. must, in common reason, have the same authority. I think it was rightly observed, that the sentence consisted, in effect, of two parts, one reversing the decree, and therefore vesting a right to a restitution or a recovery in value in the appellant, the other ordering a specific restitution. If that specific redress is from any cause rendered impracticable, those who have unjustly, and upon a sentence determined to be erroneous, received the property or its value to their own use, must in justice be accountable; otherwise *form*, which ought only to be the handmaid of right, might prove its treacherous destroyer. The District Court having sole original authority in cases of this kind, must have equal power, as to such subjects, with the power possessed by this court in any case where it has original jurisdiction, with this difference only, that in the one case a writ of error is allowed, in the other not. The Court of Appeals, which passed the final decree, having expired, there seems at least as much reason for a court of similar jurisdiction as to the subject-matter, proceeding to give effect to its decisions, as there can be for a Court of Admiralty of one nation giving effect to the decision of a Court of Admiralty of another, to which perhaps it is a perfect stranger, and of which it may know little more than that they equally belong to the great family of mankind. I am therefore of opinion, that the District Court, or the Circuit Court, acting specially in this instance on account of the incapacity of the former (as the law empowered it to do) had authority to enforce the decree in question, by decreeing damages in lieu of a specific restitution, which was impracticable.

The third question is,

Whether the authority hath been exercised properly in this instance, under all the circumstances of the case?

The material circumstances to be considered, either from facts admitted on the face of the record, or the public proceedings referred to by it, and of which we are judicially to take notice, seem to be as follow:

That the brig M'Clary was fitted out, under the authority, and pursuant to certain resolutions of Congress, in consequence of which, an act of the legislature had passed, in the state of *New Hampshire*, which complied partially with those resolutions, but made some regulations apparently intended as a restriction upon them (whatever might be their legal operation:) That on the 30th Oct. 1777, she captured the brig *Susanna* and cargo on the high seas: That the captured property was libelled in the Court Maritime of *New Hampshire*, (erected by the state law) on the 11th November, 1777: That *Elisha Doane* (whose administrators are the defendants in error in this cause) exhibited his claim on the 1st December following; and

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on the 16th the property was condemned, and ordered to be distributed according to law: That within five days (the time for praying an appeal prescribed by the resolutions of Congress) *Doane* prayed an appeal to Congress, which was disallowed: That he then prayed and obtained an appeal to the superior court of *New Hampshire*, agreeably to the directions of the state law, which allowed of such an appeal in cases of this kind, the act providing for an appeal to Congress, only in case of a capture by an armed vessel fitted out at the charge of the United Colonies: That on the first Tuesday in September, 1778, the superior court adjudged the property to be forfeited, and ordered it to be sold by the sheriff at public vendue for the use of the libellants; and the court further ordered, "that the proceeds "thereof, after deducting charges, should be paid to *John Pen-* "*hallow* and *Jacob Treadwell*, agents for the owners, and to "*George Wentworth* agent for the captors, *to be by the said a-* "*gents paid and distributed to the persons mentioned therein*, ac- "cording to the law of the state in that case made." 1795.

That an appeal from this decree to Congress was prayed within five days, and disallowed: and that afterwards, in obedience to the decree, and in virtue of it, the property was sold, and distributed to those entitled under the decree; and the proportionate shares (upon the supposition of a lawful capture) are admitted to have rightly been, one half to the owners, and the other half to the officers, mariners, and seamen.

That an application was afterwards made to the commissioners for hearing appeals under the authority of Congress; and after due notice to the libellants in the original suit, who appeared and pleaded to the jurisdiction, stating not only the defect of the authority of the court to sustain the appeal under any circumstances, but also special reasons why the Appellant was not entitled to the benefit of an appeal under the circumstances of the case (viz. the Appellant's waving the benefit of his appeal to Congress, by taking an actual appeal to the superior court of *New-Hampshire*; that the appeal first demanded, was not prosecuted for more than forty days; and that by the resolution of Congress, no appeal should be had from the verdict of a jury, but only the sentence of the judge) The commissioners, on the 26th *June*, 1779, decreed that they had jurisdiction, but declined any further proceedings at that time in the cause, for a reason they alledge.

That on the 12th *September* 1783, this case again came before the court of appeals, established under the articles of confederation; which, after a full hearing and solemn argument by the advocates on both sides, passed a definitive decree in these words, viz.

"It

1795. "It is hereby considered, and finally adjudged and decreed by "this court, that the sentences or decrees passed by the infe- "rior and superior courts of judicature for the county of "*Rockingham*, in the above cause, so far as the same have re- "lation to the property specified in the claims of *Elisha Doane*, "*Isaiah Doane*, and *James Shepherd*, be, and the same are "hereby revoked, reversed, and annulled, and that the said pro- "perty specified in the said claims, be restored to the said claim- "ants respectively; and it is hereby ordered, that the parties to "the appeal each pay their own costs, which have accrued "in the prosecution of the said appeal in this court."

In this case considerable difficulty has arisen from the peculiar manner of pleading, which is said to be warranted by local practice, but which certainly has very much contributed to embarrass the question in the cause. There is neither a complete demurrer, nor, I conceive, a regular issue; and it may be deemed doubtful, whether what is termed a plea, ought to be considered as a plea or an answer. I had, therefore, at first strong doubts whether there was sufficient matter before us to ground a final decree: But upon reflection it seems to me, that as the case has been argued on both sides, upon a supposition that a final decree could be made; as there has been no application on either, for the examination of testimony, but the hearing took place without objection upon the pleadings as they stand, and consequently, we can regard the facts, only as stated on the record; as an express consent that the cause should be decided on this footing, would undoubtedly have been binding, and the circumstances in this case evidently prove an implied one; I think the pleadings as they stand, will afford sufficient foundation for a decree, especially according to those principles of practice, which we are told prevail in the state from which this record comes—a practice which, until altered, we undoubtedly ought to pursue, when it is not substantially inconsistent with justice.

Several objections have been offered (admitting the validity of the final decree, in respect to the authority of the court upon the points then before them) which I will consider in the best manner in my power.—

1. It is objected that the Appellant *Doane* was dead, before the final decision which was given in *September*, 1783; and this it is alledged, though not appearing on the face of the record, does appear from the letters of administration produced by the libellants, which letters are dated in *February* 1783.

Admitting that the courts are bound to inspect the date of the letters, and to regard that date as conclusive, and to infer the fact accordingly from it; several answers have been given to this objection; either of which, if valid, is decisive.

1. That

1. That the proceeding in queſtion was a proceeding *in rem*, and upon ſuch proceeding in civil law courts, the death of a party does not abate. I incline to think the law is ſo, but as my opinion is clear on other points in anſwer to the objection, I avoid giving an opinion on this. 1795.

2. That admitting the decree for this cauſe to be erroneous, it can only be avoided by a ſolemn proceeding in the nature of a proceeding in error, and cannot be enquired into in this collateral way.

Upon this point I am clear, that the decree was not rendered abſolutely void, but muſt ſtand regularly good till reverſed for this error, if it be one. So the matter ſtood while the court of appeals was in being. If the Appellees could have avoided the decree for this error, they might have applied to that court to have reviewed its decree upon this ſuggeſtion. The expiration of the court is no reaſon why the law in this particular ſhould be conſidered as changed. It is true, in many caſes where there has been error in a ſuit, and this has affected the right of a perſon not a party, this error has been admitted to be ſhewn in a ſuit where the point came collaterally in queſtion. But it has never been permitted to a party who might have ſet aſide the original judgment for error. I ſpeak now of proceedings at common law. The ſame reaſon, I think, applies in this caſe. It does, indeed, ſeem reaſonable, that if one party can proceed in the Diſtrict Court to enforce the decree, the other party may to impeach it. But then this ought to be done in the ſame mode as in the other court, and that for a very ſubſtantial reaſon: Becauſe, when that ſuggeſtion is the ſole ground of enquiry, the other party may come prepared to ſhew many things to do away its force. He may (for aught I know) be permitted to ſhew a miſtake in the date of the letters. He may ſhew an actual knowledge of the fact by the other party previous to the decree, and an acquieſcence in it. He may poſſibly ſhew that the adminiſtrators were in fact before the court, though this does not appear on the face of the proceedings. As the enquiry in this caſe is into a fact, perhaps any thing of this kind may be ſhewn, and, if ſo, there ſurely ought to be an opportunity of doing it.

3. There ſeems great reaſon in what was alledged at the bar, that though it might have been competent for the adminiſtrators, had the decree been againſt *Doane*, to have ſhewn this fact for error, becauſe neither the principal nor they had any opportunity of ſupporting their right before the court, when the decree was given, the former being dead, and the latter not being called upon, yet that it is not competent for the Appellees, who were before the court, were heard, and cannot alledge (had that been the fact) that *they* had ſuſtained any prejudice by their being heard *ex parte*.

It

1795 It is a rule at common law (the reaſon applies in equity and other civil law caſes) that if a party can plead a fact, material to his defence, and omits to do it at the proper time, he can never avail himſelf of it afterwards.

They had a day in court to plead the death of the Appellant. If they ſay they did not know of it, the ſame might be alledged in any caſe at common law, where we know it will not avail. The law rather chuſes that a party ſhould incur a riſque of this nature, than leave a door open to endleſs litigation upon pretences, the truth of which it is very difficult to diſcover.

4. This is an error in fact, and, in my opinion, it was a powerful argument, that if we cannot reverſe a decree even of a Diſtrict or Circuit Court for any *error in fact*, we have no ground to ſet aſide the ſolemn and final decree of a court that has expired, for ſuch an error. The argument, in my opinion, is altogether *a fortiori*.

II. The death of *Doane* has been alledged for another purpoſe.

It is ſaid, that the decree is to reſtore to *Eliſha Doane*, which was impoſſible, becauſe *Eliſha Doane* was not then in being. Admitting that upon this record we are to take judicial notice that *Doane* was dead at the time of pronouncing the decree (in which I am by no means clear) yet if this was the real reaſon why the Plaintiffs in error had withheld the property or its proceeds, they might themſelves have ſaid ſo. They have not, and as each party generally makes the beſt of his own caſe, we are to preſume that did not in fact conſtitute their reaſon. In this caſe it could be of no avail, but at the utmoſt to prevent the allowance of intereſt until a demand actually made. It never could deſtroy the whole beneficial effect of a decree given *in rem*, and when the parties who make the objection were in court, and parties to the very decree complained of. I think nothing can be more evident, than that if the decree be not totally void, the adminiſtrators are entitled to the benefit of it, at leaſt until it is ſet aſide for error, if there be any error in it, and ſuch a remedy is now practicable. If a *ſcire facias* was neceſſary before execution could have been obtained out of the court which paſſed the decree, it could be for no other reaſon than that the other party might have an opportunity to conteſt the validity of the letters, and the exiſtence of the adminiſtration, if any ſuch objection could be ſupported. Such an objection might have been made here. It has not been made. There is, therefore, I conceive, no principle of law or juſtice which forbids giving effect to the decree upon this ground.

III.

III. Another objection is, that the cauſe was not regularly brought up to the Court of Appeals, and proceeded on, agreeably to the reſolutions of Congreſs. 1795.

There does not appear any ground for this objection in point of fact. But I am clear that this is a point not now enquirable into. When a court has final and excluſive juriſdiction in a caſe, and has pronounced a ſolemn judgment, every other court muſt preſume that all their previous proceedings were right, of which indeed they were the only competent judges.

IV. It is alledged, damages were not prayed for by the libel. It is a ſufficient anſwer, that there is a prayer for general relief. And ſo little do I think of this objection, and ſo much of the duty of a court, unaided by formal applications, where there is a ſubſtantial one, that I am ſtrongly induced to think, if a caſe proper for a ſpecific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court even in this caſe would be juſtified in granting the relief that might be properly afforded, if the party who had committed the miſtake conſented to it: without that indeed it might be improper, for no court ought to force a benefit on a party unwilling to receive it.

Theſe objections being all got over, which were urged againſt any relief whatſoever, it is neceſſary to conſider the particular objections againſt the relief actually afforded. And here, I think, very formidable objections occur.

I think the decree erroneous in theſe particulars:

1. In decreeing intereſt for the time previous to the date of the decree in 1783.

2. In granting full damages againſt all the parties, without diſtinguiſhing between the owners to whom one half was diſtributed, and the agent who received the other half for the benefit of the officers, mariners and ſeamen.

3. In making *George Wentworth*, the agent, perſonally liable for any part.

1. As to the firſt point, as this libel proceeds only, and can be ſupported, as I conceive, upon no other ground, upon the principle of enforcing the decree of *September* 1783, ſo that the Libellants might recover ſuch benefit from it as the nature of the caſe could admit, their caſe is not to be made better or worſe, as to the original right, than as the Court of Appeals decided it.

The Court of Appeals might have decreed ſatisfaction for detention, but did not. They did not even decree coſts, but ordered each party to pay his own coſts. Theſe things were altogether diſcretionary in the court. That was the proper court to judge, whether any damages ſhould be allowed for detention. If the decree is to be final and concluſive as to the ſubject

1795. subject matter, it must be so as completely in respect to the detention, which formed one part of the case, as to the restoration, which formed the principal object of it.

I should indeed have had some doubts as to the subsequent interest, had it appeared that the Defendants had been unable to comply substantially with the decree, owing to the death of *Doane*, and the want, (had that been the case) of a subsequent demand by the Administrators. But as that is not alledged, and they set up their whole defence upon the point of right, merely, we are not to presume, that those circumstances (if the Administrators did not make a demand, with respect to which nothing appears) had any weight in inducing their non-compliance with the decree.

2. I am of opinion, that damages against all the Defendants jointly, ought not to have been given. We are to look at substance, not form. There were, in effect, two decrees, originally, one half of the value of the property to one party, the other half to another. The reversal of the decree ought to affect the decree itself, in the manner in which it was given. Consequently, each party ought only to be required to restore what he was adjudged to receive. The case of joint trespasses stated at the bar, does, in my opinion, by no means apply. The privateer in question, had a lawful commission. In the execution of such an authority, difficulties often arise. Where they happen, *bona fide*, the master is considered in no fault, and neither he nor his owners made accountable, even in case of a mistaken seizure, but for restoration, and, at the utmost, costs. In case of gross misbehaviour, not only costs, but damages will be allowed by the court of prize. It seems now to be settled that they have exclusive jurisdiction on all such subjects. As not even costs were allowed in this case, we are to infer that the seizure was *prima facie* innocent; consequently, if a principle of the common law, deemed by many highly rigorous, and founded, perhaps, rather on the forms of proceeding, than on strict justice, if those forms did not interfere, could be applied to a case arising in a court, not only authorised, but bound to distinguish between a mere mistake, and a wanton abuse of power, there is no foundation for such an application, in fact, in the present instance.

As owners are, in all instances, made jointly liable *ex contractu*, and their respective shares are matters of private cognizance, so that they, in all instances, appear jointly before the court, and a payment to one owner is, in law, a payment to all; I can discover no principle, upon which any discrimination could be properly made in this case, in regard to the different interests and actual receipts of the owners. I think, therefore, the decree in regard to one moiety, ought to be jointly against all the owners.

3. The

3. The third error in the decree, in my opinion, is, making *George Wentworth*, the agent, liable for any part. I have had conſiderable doubts on this ſubject, but upon the fulleſt conſideration I have been able to beſtow on it, I think he is not liable. Had he held any of the property, at the time of the decree of the Court of Appeals, he would have been undoubtedly liable. Had he any now, or any of the proceeds in his hands, he would alſo be liable. Perhaps he might, had he held any of the property or proceeds, after actual notice of the Court of Appeals taking cognizance of this caſe. Neither of theſe facts appears on the face of the record, and as they are of importance, and neither is aſſerted, neither is to be preſumed. The contrary, indeed, may be fairly inferred from the ſtatement on the record, and has been candidly acknowledged to be the real truth. He therefore appears in the character of a mere agent, acting avowedly for the benefit of others, and not for his own; and as he had paid away the money in virtue of a decree of a court, having *prima facie* authority for the time, to decide whether an appeal did, or did not lie; I think he ought not to be ordered to refund. It is alledged that the prayer of an appeal, in a caſe where an appeal lies, *ipſo facto*, ſuſpends the proceedings, and all afterwards is *coram non judice*. I cannot admit the doctrine in that extent. Where there are inferior and ſuperior juriſdictions, and an appeal is allowed from the former to the latter, and it is the expreſs duty of the party praying an appeal, to apply in the firſt inſtance, to the inferior court (as I conceive it was in this caſe under the reſolutions of Congreſs, which directed an appeal to be prayed for within five days, and ſecurity to be taken) I muſt preſume that that court is *prima facie* to judge whether it is applied for in a proper manner, and whether all the requiſites previous to his being fully entitled to it, are complied with. If the court decides in any of theſe particulars erroneouſly, it would be abſurd to ſay, that the party ſhould loſe the benefit of his appeal, but, in my opinion, it would be equally unjuſt to hold, that a party who obeyed the decree of a court, over whom he had no controul, ſhould ſuffer by his reſpect to the law, which conſtituted that court, and which muſt therefore mean to ſupport its deciſions, in a cauſe coming within its juriſdiction, while they remain uncontrouled by any ſuperior tribunal. It was ſhewn, that an inhibition, in caſes of this kind, ſometimes at leaſt iſſues to forbid the court's further proceeding. Can there be a ſtronger proof, that the court had authority *de facto* (whatever may be ſaid as to its authority *de jure*) without that interpoſition! The law never does a nugatory act, and therefore, I preſume, would not forbid the doing of a thing, which if done, is totally and abſolutely void. It was ſaid, this was to bring the judge into con- 1795.

1795. tempt. But if the conduct of the judge who is bound to know his juriſdiction is in the mean time innocent, ſurely an obedience to him by a party, who is not to be preſumed capable of deciding on the juriſdiction by his own judgment, muſt be ſo. *George Wentworth*, on the face of the whole proceedings, was a mere *agent*, an attorney *in fact*, and for aught I can ſee, as little liable to refund in a caſe of this ſort, as any attorney, in fact, or even an attorney at law, to whom money had been paid under a judgment or decree, and who had paid it away to his client. An agent in caſes of this kind, is allowed by law. They are recognized, I believe, in all *prize acts*. Mariners, whoſe employment is on the ſea, cannot be required without injuſtice to attend their caſes in perſon. In caſes of privateers, the captors are ſo numerous that the employment of one or more agents on ſhore, ſeems unavoidable. The law, when it allows a benefit, never intends that it ſhall be imperfectly enjoyed; therefore in allowing privateering, it allows *agents*. Theſe I conſider as *nominal* parties, and that the real parties are their principals. Now I will ſuppoſe that in a common law caſe an infant ſues in a perſonal action by his guardian, and obtains a judgment; the guardian receives the money, and pays it to the infant after he comes of age. The judgment is afterwards reverſed. Can the guardian ever be made to refund to the defendant, or muſt the perſon who was the infant do it? This caſe appears to me a very parallel one in all its circumſtances. The infant cannot act for himſelf, and therefore is allowed to act by his guardian. The law takes notice, by allowing agents, that perſons concerned in privateers, at leaſt, cannot do well without them. The guardian is nominally a party; ſo is the agent: but the infant, in the one caſe, and the principals, in the other, are the real parties. The guardian is accountable to the infant, for money he received for him: ſo is the agent to the principal, for money he receives. There is, that I can imagine, but one difference. that can be ſuggeſted between them; that in the one caſe, the judgment is good till reverſed; and, therefore, all lawful acts intermediately done, are valid. But the diſallowance of the appeal, is ſaid to be a nullity, and all ſubſequent proceedings in that court are void. I admit the conſequence, if the law be ſo. But I have already ſtated reaſons, why I think it is otherwiſe. A court of juſtice, indeed, ought at its peril to take notice of its own juriſdiction, and it is not often that caſes of ſuch doubt ariſe, that a Judge can be at a loſs on the ſubject. But it may happen, and does ſometimes happen, that innocent and ſerious doubts, are really entertained. Is a court, therefore, becauſe its judgments may be finally diſſented from, by a ſuperior tribunal, to be conſidered as flying in the face of the law, ſo that parties before it, ſhall not only

only be protected in disobeying it, but punished for their obedience? If this be the case, the old maxim, *cedunt arma togæ*, will very ill apply to Courts of Justice. Instead of being the peaceful arbiters of right, and the sacred asylum of unprotected innocence, their very *forums* will be the seat of war and confusion. I admit, indeed, where there is a conflict of jurisdiction, and the party entitled to a decree, is prohibited from obeying it, by a power claiming a superior cognizance, he must at his peril obey one or the other; but this arises from the absolute necessity of the case, because, whether the one or the other be right or wrong, must depend on a subsequent decision. In this case, *George Wentworth*, before the distribution, received no monition, or any other process from the tribunal alledged to be superior. He could not even be certain that the Appellants would carry their application further. I consider him, therefore, justifiable in obeying the decree, which at the time, was compulsory upon him, and for a disobedience to which, he might have been committed for a contempt, according to the opinion of the court which pronounced it. The parties still have their remedy against those who actually received the money, or their representatives, if they can be found. They may perhaps be entitled to a remedy under the bond given, when the commission of the privateer was granted. If either of these remedies be difficult or inefficient, that does not make *George Wentworth*, in point of law, more liable than if they were perfectly easy, and clearly effectual. It will be one melancholy instance, in addition to a thousand others, of the distress incident to a doubtful and imperfect system of jurisprudence, which has been since happily changed for one so precise and so comprehensive, as to leave little room for such painful and destructive questions hereafter. 1795.

The 4th question is,

Whether this court can now rectify the decree in respect to the parts of it considered to be erroneous, or must affirm or reverse in the whole.

The latter is certainly the general method at common law, and it has been contended, that as this proceeding is on a writ of error, it must have all the incidents of a writ of error at common law. The argument would be conclusive, if this was a common law proceeding, but as it is not, I do not conceive, that it necessarily applies. An incident to one subject cannot be presumed, by the very name of such an incident, to be intended to apply to a subject totally different. I presume the term, "writ of error," was made use of, because we are prohibited from reviewing facts, and therefore must be confined to the errors on the record. But as this is a civil law proceeding, I conceive the word "error" must be applied to such er-

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1795. rors as are deemed ſuch, by the principles of the civil law, and that in rectifying the error, we muſt proceed according to thoſe principles. In a civil law court, I believe, it is the conſtant practice to modify a decree upon an appeal, as the juſtice of the caſe requires; and in this inſtance, it appears to me, under the 24th ſection of the judicial act, we are to render ſuch a decree as, in our opinion, the Diſtrict Court ought to have rendered. If this was a caſe, wherein damages were uncertain, and wherein for that reaſon, the cauſe ſhould be remanded for a final deciſion, (which it does not appear to be, becauſe the Libellants in the original ſuit had a decree in their favour, which is now to be affirmed in part) yet the damages here are not uncertain, becauſe we all agree, that intereſt ought to be allowed from the date of the decree, in *September*, 1783, upon the value of the property, as ſpecified in the report, againſt thoſe who are to be adjudged to pay the principal.

Upon the whole, my opinion is, that the decree be affirmed in reſpect to the recovery of the Libellants, in the original action againſt all the Defendants but *George Wentworth*; that the libel againſt him, be adjudged to be diſmiſſed; but that there be recovered againſt the other Defendants in the original action, the value of the property they received, as aſcertained in the Circuit Court, with intereſt from the 17th of *September*, 1783.

I am alſo of opinion, that the reſpective parties ſhould pay their own coſts.

BLAIR, *Juſtice*. When this cauſe came before me, at *Exeter*, in *New Hampſhire*, I felt myſelf in a delicate ſituation, in having a cauſe of ſuch magnitude, and at the ſame time, of ſuch novelty and difficulty, as to have drawn the judgment of men of eminence, different ways, brought before me for my ſingle deciſion. It was, however, a conſolation to know, that whatever that deciſion might be, it was not intended to be final, and I can truly ſay, it will give me pleaſure to have any errors I may have committed, corrected in this court. Two points, and if I miſtake not, only two, were brought before me: The firſt, whether under the deſcription of Admiralty and Maritime juriſdiction, the judiciary bill gave to the Diſtrict Court any juriſdiction concerning prizes, I decided in the affirmative; and the ſame deciſion having been afterwards made in this court, in the caſe of *Glaſſe*, and others, I conſider that as now ſettled. The other point, was, whether the Court of Appeals, erected by Congreſs, had authority to reverſe the ſentences given in the Courts of Admiralty of the ſeveral States; and the ſource of the objection upon this point, was the defect of authority in the Congreſs itſelf. Here, alſo, my ſentence affirmed the juriſdiction.

I have attended as diligently, and as impartially as I could,

to the arguments of the gentlemen, upon the preſent occaſion, to diſcover, if poſſible, how I may have been led aſtray, in the deciſion of this queſtion; but as the impreſſions which my mind firſt received, continue uneffaced, (whether through the force of truth, or from the difficulty of changing opinions, once deliberately formed) I will repeat here the opinion which I delivered in the Circuit Court, as the beſt method I can take for explaining the reaſons upon which it was founded. I would premiſe, however, that it contains ſomething relative to what had been ſaid at the bar of the Circuit Court, but which I believe was not mentioned on this occaſion. 1795.

"The immediate queſtion is, whether Congreſs had a right to exerciſe, by themſelves, by their committees, or by any regular court of Appeals by them erected, an appellate juriſdiction, to affirm or reverſe a ſentence of a ſtate court of Admiralty, in a queſtion whether prize or no prize. If they poſſeſſed ſuch an authority, it muſt be derivative, and its ſource either mediately or immediately the will of the people; uſurpation can give no right. The reſpondents contend they had no ſuch authority, till the completion of the Confederation in 1781, but only a recommendatory power; the Libellants inſiſt, that Congreſs was conſidered as the ſovereign power of war and peace, reſpecting *Great-Britain*, and that to that power is neceſſarily incident that of carrying on war in a regular way, of raiſing armies, making regulations for their diſcipline and government, commiſſioning officers, equipping fleets, granting letters of marque and repriſal, the power (now conteſted) of deciding, in all caſes of capture, queſtions whether prize or not, and every power neceſſarily incident to a ſtate of war. It is, at leaſt, certain, that the political ſituation of the American Colonies, required a union of council and of force, by wiſe meaſures to bring about, if poſſible, a reconciliation with the mother-country, on a baſis of freedom and ſecurity, or, if this ſhould fail, by vigorous meaſures to defeat the deſigns of their tyrannical invaders; and although this alone cannot ſuffice for an inveſtiture in Congreſs, of the powers neceſſary to that end, yet if the powers given be delegated in terms large enough to comprehend this extent of authority, but which may alſo be ſatisfied by a more limited conſtruction, the ſuppoſed neceſſity for ſuch powers given to a federal head (and the counſel for the reſpondents have admitted that it would have been good policy) is no contemptible argument for ſuppoſing it actually given. In the beginning of the year 1775, our affairs were drawing faſt to a criſis, and for ſome time before the battle of *Lexington*, a ſtate of warfare muſt in the minds of all men have been an expected event. Some of the delagations (I think three) of members to the Congreſs which met in *May* of that year, contain

1795. contain nothing but ſimple powers to meet Congreſs; the reſt expreſsly give authority to their delagates to conſent to all ſuch further meaſures, as they and the ſaid Congreſs ſhall think neceſſary, for obtaining a redreſs of *American* grievances, and a ſecurity of their rights. It is not in all of them worded alike, but in ſubſtance, that ſeems to be the ſenſe. Every thing which may be deemed neceſſary! I think it cannot well be ſuppoſed, that in ſuch a delegation of authority, at ſuch a time, there was not an eye to war, if that ſhould become neceſſary. But it is objected, that at moſt, no greater power was given to Congreſs than to enter into a definitive war with *Great-Britain*, not the right of war and peace generally; and even that war, till the declaration of independence, would be only a civil war. But why is not a definitive war againſt *Great-Britain* (call it if you will a civil war) to be conducted on the ſame principles as any other: If it was a civil war, ſtill we do not allow it to have been a rebellion—*America* reſiſted and became thereby engaged in what ſhe deemed a juſt war. It was not the war of a lawleſs banditti, but of freemen fighting for their deareſt rights, and of men lovers of order and good government. Was it not as neceſſary in ſuch a war, as in any between contending nations, that the law of nations ſhould be obſerved, and that thoſe who had the conducting of it, ſhould be armed with every authority for preventing injuries to neutral powers, and their ſubjects, and even cruelty to the enemy? The power ſuppoſed to have been given to Congreſs, being confined to a definitive war againſt *Great-Britain*, and not extending to the rights of peace and war generally, appears to me to make no material difference; ſtill the ſame neceſſity recurs, of confining the evil of the war to the enemy againſt whom it is waged. Till a formal declaration of independence the people of the Colonies are ſaid to have continued ſubjects to *Great-Britain*; true, and that circumſtance it is, which denominates the war a civil war, as to which I have already ſtated how, in my mind, the queſtion is affected by that circumſtance. But it was aſked whether, if during the war, *Great-Britain*, at any time before the declaration of independence, had declared war againſt any nation of Europe, that nation would not have had a right to treat *America* with hoſtility as being ſubject to *Great-Britain*? According to this ſuppoſition, *Great-Britain* might have had ſome temptation to declare ſuch war that ſhe might have the co-operation of her enemy, to reduce her colonies to obedience. But *Great-Britain* was too wiſe to adopt ſuch a policy; ſhe knew that by her engaging in ſuch a war, the colonies, inſtead of finding a new enemy to oppoſe, would have known where to find a friend; they might have formed an alliance with ſuch a power, who probably would have conſidered it as an acquiſi-

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tion, and Congreſs might have been the ſooner encouraged to 1795.
ſeparate from *Great-Britain*, by a formal declaration of inde-
pendence. As the ſuppoſition that Congreſs was inveſted with all the rights of war, in reſpect to *Great-Britain*, is of great moment in the preſent cauſe, and as the power may not be ſo ſatisfactorily conveyed by the inſtructions to the ſeveral delegates as might be wiſhed, partly becauſe ſome of them did not exhibit farther inſtructions than to attend Congreſs, and partly becauſe the inſtructions given to the reſt, may be ſatisfied by a different conſtruction, it may be proper to conſider the manner in which Congreſs, by their proceedings, appear to have conſidered their powers; not that by any thing of this ſort, they had a right to extend their authority to the deſired point, if it was not given, but becauſe in ſhewing by ſuch means, their ſenſe of the extent of their power, they gave an opportunity to their conſtituents to expreſs their diſapprobation, if they conceived Congreſs to have uſurped power, or by their co-operation to confirm the conſtruction of Congreſs; which would be as legitimate a ſource of authority, as if it had been given at firſt. If they were only a mere council, to unite by their advice and recommendation all the States in the ſame common meaſures (which, by the by, if not uniformly purſued, might be diſappointed) then the ſeveral members might be juſtly compared to ambaſſadors met in a Congreſs, and could only report their proceedings for the ratification of their principals; but Congreſs reſolved to put the colonies in a ſtate of defence; they raiſed an army, they appointed a commander in chief, with other general and field officers; they modelled the army, diſpoſed of the troops, emitted bills of credit, pledged the confederated colonies for the redemption of them, and in ſhort, acted in all reſpects like a body completely armed with all the powers of war; and at all this I find not the leaſt ſymptom of diſcontent among all the confederated ſtates, or the whole people of *America*; on the contrary, Congreſs were univerſally revered, and looked up to as our political fathers, and the ſaviours of their country. But if Congreſs poſſeſſed the right of war, they had alſo authority to equip a naval force; they did ſo, and exerciſed the ſame authority over it, as they had done over the army; they paſſed a reſolution for permitting the inhabitants of the colonies to fit out armed veſſels to cruize againſt the enemies of *America*; directed what veſſels ſhould be ſubject to capture, and preſcribed a rule of diſtribution of prizes, together with a form of commiſſion, and inſtructions to the commanders of private ſhips of war: they directed that the general aſſemblies, conventions, and councils or committees of ſafety of the United Colonies, ſhould be ſupplied with blank commiſſions, ſigned by the Preſident of Congreſs,

1795. greſs, to be by them filled up, and delivered to any perſon intending to fit out private ſhips of war, on his executing a bond, forms of which were to be ſent with the commiſſions, and the bonds to be returned to Congreſs. Theſe bonds are given to the Preſident of Congreſs, in truſt for the uſe of the United Colonies, with condition to conform to the commiſſion and inſtructions. The commiſſion, under which the Captain of the reſpondents acted, was one of theſe commiſſions, it ſeems, only this is attempted to be qualified by ſaying that it was counterſigned by the Governor of *New Hampſhire*; but this circumſtance ſeems to me to be of no importance. Whoever has the right of commiſſioning and inſtructing, muſt certainly have the right of examining and controuling, of confirming or annulling the acts of him who accepts the commiſſion, and acts under it. And this exerciſe of authority in granting commiſſions ſeems to have had the ſpecial ſanction of the ſeveral colonies, as they filled up the commiſſions, took the bonds, and tranſmitted them to Congreſs. It was urged in the courſe of the argument, that if Congreſs did enjoy the power contended for, the confederation, which was a thing of ſuch long and anxious expectation, was not of any conſequence; but it is to be obſerved, that that inſtrument contained ſome important powers which could not be derived from the right of war and peace; it was of importance alſo, as a confirmation of the powers claimed as neceſſarily incident to war, becauſe ſome of the ſtates appeared not to be ſenſible of, nor to have acknowledged ſuch incidency; and yet the power may have exiſted before. It is true, *that* inſtrument is worded in a manner, on which ſome ſtreſs has been laid, that the ſeveral States ſhould *retain* their ſovereignties, and all powers not thereby expreſsly delegated to Congreſs, as if they were, till the ratification of that compact, in poſſeſſion of all the powers thereby delegated; but it ſeems to me, that it would be going too far, from a ſingle expreſſion, uſed perhaps in a looſe ſenſe, to draw an inference ſo contrary to a known fact, to wit, that Congreſs was, with the approbation of the ſtates, in poſſeſſion of ſome of the powers there mentioned, which yet, if the word 'retain' be taken in ſo ſtrict a ſenſe, it muſt be ſuppoſed they never had. I take the truth to be, that the framers of that inſtrument were contemplating what powers Congress ought to have had at the beginning; and that in reference to the firſt occaſion of their aſſembling to oppoſe the tyranny of Great Brittain, at leaſt in reference to the time of framing the confederation, ſay, the ſtates ſhall *retain*. But however that may be, as I ſaid before, I think it is laying too great a ſtreſs upon a ſingle word, to contradict ſome things which were evidently true.

"But it was ſaid that *New Hampſhire* had a right to revoke any

any authority ſhe may have conſented to give to Congreſs, and that by her acts of aſſembly ſhe did in fact revoke it, if it were ever given. To this a very ſatisfactory anſwer was made: if ſhe had ſuch a right, there was but one way of exerciſing it, that is, by withdrawing herſelf from the confederacy; while ſhe continued a member, and had repreſentatives in Congreſs, ſhe was certainly bound by the acts of Congreſs. I am therefore of opinion that thoſe acts of *New Hampſhire*, which reſtrain the juriſdiction of Congreſs, being contrary to the legitimate powers of Congreſs, can have no binding force, and that under the authority of Congreſs an appeal well lay from the Courts of Admiralty of that State, to the Court of Commiſſioners of Appeals. That Court has already affirmed their juriſdiction in this particular caſe, upon a plea put in againſt it; and upon that account, alſo, I incline to think that this court, not being a court of ſuperior authority, ought not to call it in queſtion. Under theſe impreſſions, I muſt, of courſe, decree (whatever may be the hardſhip of the caſe) that the Reſpondents, pay to the Libellants, their damages and coſts, occaſioned by not complying with the decree of the Court of Appeals, the quantum of which to be aſcertained by Commiſſioners."

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If the reaſoning upon which I went, in pronouncing the above decree, in favour of the juriſdiction of the Court of Appeals, be unſound, and if the decree ſtand in need of ſome better ſupport, it will probably find it in the confederation, by which authority is given to Congreſs, to erect Courts of Appeal in all caſes; and from that time the authority of the court of Appeals is confeſſed; the preſent caſe was then depending before that court, they aſſerted their juriſdiction, and gave a final decree. As to the objection, that previouſly to the confederation, Congreſs were themſelves ſenſible, that they did not poſſeſs ſupreme Admiralty juriſdiction, becauſe of their *recommending* to the ſeveral States, that they ſhould erect Courts of Admiralty, for the trial of prizes, with appeal to Congreſs, I ſee not how ſuch recommendations can prove any thing of the kind; for Congreſs might have authority to eſtabliſh ſuch courts in the reſpective States, when yet they choſe only to recommend to the ſtates to do it. But admitting the authority of the Court of Appeals, and the propriety of applying to the Diſtrict Court of *New Hampſhire*, to inforce that decree in the way of damages, for not reſtoring the veſſel and cargo, when through the diſobedience of the preſent Plaintiffs in error, ſpecific reſtitution was become impoſſible, yet if any thing erroneous can be found in the decree of the Circuit Court, it is the duty of this court to correct it. It is objected, that the damages allowed, were too high, including intereſt on the appreciation

1795. preciation of the *Suſanna* and her cargo, from ſo remote a period as the ſale of the veſſel and cargo.

That *George Wentworth*, being a mere agent, and having diſtributed among thoſe who were entitled, under the decrees of the Courts of Admiralty of *New Hampſhire*, all the money by him received for their uſe, ought not to have been ſubjected by the decree of the Circuit Court, to the repayment of that money.

And that a lumping decree, ſubjecting the Reſpondents indiſcriminately, to the payment of all the damages, although their intereſts were ſeveral and diſtinct, was alſo erroneous.

It does not, indeed, appear to me, that the decree is for the payment of too large a ſum, the damages having been ſwelled by intereſt, calculated upon the appraiſed value of the *Suſanna*, her apparel, and of her cargo, from ſo remote a period. The decree of the Court of Appeals was merely for reſtitution, and that the Appellants ſhould be placed at that time in the ſame ſituation as they were in, previous to the capture. A compenſation for the loſs they ſuſtained in being in the mean time deprived of their property, was not provided for in the decree, nor were even coſts allowed. The libel in the Circuit Court being bottomed on the decree of reverſal, ſought only a compenſation in damages equivalent to a reſtitution at the time of the reverſal: Intereſt, therefore, ought, I think, to have been allowed only from that time.

George Wentworth, it is true, was not concerned in intereſt; he repreſented the intereſt of the officers and ſeamen, but had none himſelf; and a mere agent who has paid away all, or any part of the money by him received in that character, without having been by a monition notified of the appeal, will be allowed credit in his account for the money ſo paid away. But *George Wentworth* appears, I think, in another character beſides that of an agent: he was a party libellant, as ſuch he knew that the Claimants were diſſatisfied with the decrees of the Admiralty Courts of *New Hampſhire*, having prayed an appeal to Congreſs, and offered the requiſite ſecurity; and when the petition of appeal was referred to the Court of Commiſſioners, and they directed notice to be given to the parties, who appeared before that court, it ſeems evident that they had notice. What then is the effect of this? Was any thing further neceſſary to ſuſpend the decrees of the State Courts? An inhibition is, indeed, worded in a manner naturally leading to the ſuppoſition, that that inſtrument was neceſſary to effect a ſuſpenſion; but this, I think, cannot be the caſe; for, it is obſervable, that by the practice, an interval of three months is allowed before the inhibition is ſued out, in which time, if nothing had antecedently ſuſpended the ſentence, it might be carried

ried into complete effect, and every body be juſtified in their conduct, as paying obedience to a decree continuing in full force. The inhibition may be intended only as a more formal direction to ceaſe farther proceedings, when yet they may have been inhibited before: it has a farther uſe alſo, for it appoints a day for the attendance of the parties. Conformably to this idea, it is ſaid, in *Domat*, that the appeal ſuſpends the decree. But a diſtinction is attempted here; it is admitted that an appeal allowed by the inferior court, ſuſpends, while an appeal received by a ſuperior court, is denied to have that effect. But according to *Domat*, it works a ſuſpenſion, even againſt the will of the inferior Judge; and it would be very ſtrange, if the ſuſpending operation of an appeal, to a Judge who has an authority to reverſe, ſhould depend upon the conſent of the inferior Judge. But if the ſentences of the State Courts were indeed ſuſpended, no perſon had authority to act under them; and if any do, he takes upon himſelf the conſequences. Beſides, if *George Wentworth* had innocently and without notice, diſtributed the money which came to his hands, ſhould not this have been ſhewn to the Court of Appeals? If that had been done, perhaps after reverſing the decrees of the State Court, inſtead of decreeing reſtitution, they might have only decreed that the owners ſhould pay to the Appellants, the moiety of the ſales by them received. But they have decreed reſtitution ſpecifically; and if this court ſhould ſo model the decree of the Circuit Court, as to exonerate Mr. *Wentworth*, as to the moiety of the money by him received, it will ſubſtantially alter the decree of the Court of Appeals; and yet we ſay, that the decree now is to be bottomed on that of the Court of Appeals, which is now to be ſuppoſed right; and that for that reaſon it was erroneous in the Circuit Court, to carry intereſt farther back than from the period of reverſal, and in this way give damages, which were not intended by the Court of Appeals. 1795.

The decree of the Circuit Court, appears now, I confeſs, to be wrong, in that it ſubjects all the Defendants, indiſcriminately, to the payment of all the damages. In the original libel, they had indeed joined, but it was in right of ſeveral intereſts, which I think ought to have been diſtinguiſhed in the decree; juſtice obviouſly requires this; ſo obviouſly, that it is enough to ſtate the caſe to obtain the mind's aſſent to the propriety of diſtributive damages, inſtead of thoſe which the decree contemplates. I will only ſay further, that I have no remembrance of having had this point brought to my view at the Circuit Court, and it certainly did not occur to myſelf; but if any thing was ſaid upon the point, and I, with deliberation, then preferred the decree as it ſtands, I am clearly now, of a different opinion. Upon the whole, I think the decree of the Circuit

1795. Circuit Court will ſtand as it ought, when corrected by reducing the damages in the manner propoſed, and when ſo reduced, by proportioning them among the then Defendants, according to their diſtinct intereſts.

CUSHING, *Juſtice.* The facts of this caſe being already fully ſtated by the court, I ſhall go on to enquire, whether the decree of the Circuit Court ought to be reverſed, for any of the errors aſſigned.

The firſt is, that the Court of Appeals, which made the decree of reſtoration, had not juriſdiction of the cauſe.

In anſwer to this, I concur with the reſt of the court, that the Court of Appeals, being a court under the confederation of 1781, of all the ſtates, and being a court for "*determining finally, appeals in all caſes of capture,*" and ſo being the higheſt court, the dernier reſort in all ſuch caſes, their deciſion upon the juriſdiction and upon the merits of the cauſe, having heard the parties by their council, muſt be final and concluſive, to this, and all other courts: to this, as a Court of Admiralty, becauſe it is a court of the ſame kind, as far as relates to prize, and without any controuling or reviſionary powers over it; to this as a court of common law, becauſe it is entirely a prize-matter, and not of common law cognizance. The caſes, therefore, cited to ſhew, that the common law is of general juriſdiction, and that the court of King's bench, prohibits, controuls, and keeps within their line, Admiralty Courts, Spiritual Courts, and other courts of a ſpecial, limited juriſdiction, do not, I conceive, touch this caſe.

It is conceded by all, that the deciſion of a court competent is final and binding. Now, if the Court of Appeals was, under the confederation of all the ſtates, a court conſtituted "*for determining finally appeals in all caſes of capture,*" it was a court competent; and they have decided. Again; the Admiralty of *England* gives credence and force to the deciſions of foreign courts of Admiralty; why not equal reaſon here?

It is true, the courts of common law there, will not allow a greater latitude to the juriſdiction of foreign courts of Admiralty, than to their own; as it ſeems natural and reaſonable, they ſhould not; for inſtance, holding plea of a contract made entirely at land, which ſeems to have been the ſubſtantial ground of a prohibition, in the caſe cited, reſpecting the decree in Spain.

If the decree of the court of Apeals muſt he conſidered as binding, as it muſt, or there may never be an end to this controverſy; that will carry an anſwer to ſeveral other errors aſſigned, viz. the third, fifth, and ſeventh, reſpecting the cauſe not being regularly before Congreſs or the court, and reſpecting the Circuit Court not entering into the merits—and to

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ſome other particular exceptions; as, that appealing to the Superior Court of *New-Hampſhire*, was a waver of the right of appeal to Congreſs: If that appeal was conſiſtent with the reſolve of Congreſs, which only provided an appeal to Congreſs in the laſt reſort, it was not a waver. Again, it is ſaid, there ought to have been a jury at the Court of Appeals; but that, clearly, was not the intent of the reſolve of Congreſs, nor of the Confederation, nor correſpondent to the proceedings in courts of Admiralty, even where trials by jury are uſed and accuſtomed in other matters; nor was it thought a proper or neceſſary proviſion in the preſent conſtitution, which has been adopted by the people of the *United States.* 1795.

As to the original queſtion of the powers of Congreſs, reſpecting captures, much has been well and eloquently ſaid on both ſides. I have no doubt of the ſovereignty of the ſtates, ſaving the powers delegated to Congreſs, being ſuch as were, "*proper and neceſſary*" to carry on, unitedly, the common defence in the open war, that was waged againſt this country, and in ſupport of their liberties to the end of the conteſt.

But, as has been ſaid, I conceive we are concluded upon that point, by a final deciſion heretofore made.

The 2d exception in error is, that the ſentence of the Court of Appeals was void by the death of Mr. *Doane.*

That fact does not appear upon the record of the Court of Appeals, and I think we cannot reverſe the decree in this incidental way, if it could be done upon a writ of error. If it was pleadable in abatement, it ought to have been pleaded or ſuggeſted there by the oppoſite party.

On the contrary, it is implied by the record, that *Doane* was alive; otherwiſe he could not have been heard by his council as the record ſets forth; for a dead man could not have council or attorney. On the other hand, the letters of adminiſtration imply that he was dead at the time; but thoſe letters were not before the court, and therefore could not be a ground for their abating the ſuit, if it was abateable at all for ſuch a cauſe. Here ſeems to be record againſt record, as far as implications go, and I take it to be an error in fact, for which, by the judicial act, there is to be no reverſal. Upon this head, a caſe in Sir *Thos. Raymond*, is cited by the council for the Plaintiff in error, of trover by five plaintiffs—one dies—the reſt proceed to verdict and judgment—and adjudged error, becauſe every man is to recover according to the right he has at the time of bringing the action; and here each one was not, at the time of bringing the action, entitled to ſo much as at the death of one of the plaintiffs.

But a caſe in *Chancery Caſes*, *p.* 122, is more in point—where money was made payable by the decree to a man that was

1795. was dead, and yet adjudged, among other things, no error. But another matter, which ſeems well to rule this caſe, is, that, being a ſuit *in rem*, death does not abate it.

So ſay ſome books, and I do not remember to have heard any to the contrary. It does not affect the juſtice of the cauſe; it makes no odds to the plaintiff in error, whether the money is to be paid to Colonel *Doane* being alive, or to his legal repreſentatives, if dead.

The 4th exception, that damages are not prayed for, yet decreed, is anſwered by a prayer for general relief.

The 8th exception is, that the Diſtrict and Circuit Court poſſeſſed not admiralty juriſdiction, and that the Circuit Court had no right to carry the decree into execution.

If courts of Admiralty can carry into execution decrees of foreign Admiralties, as ſeems to be ſettled law and uſage; and if the Diſtrict and Circuit Courts, have admiralty powers by the law and conſtitution, as was adjudged and determined by this court laſt *February*, I think there can be no doubt upon this point.

Another queſtion of conſequence is, whether Mr. *George Wentworth*, being agent for the captors, and having paid over, can be anſwerable jointly with the other libellants for the whole, or, in any way, for any part. If it was ſimply the caſe of an agent regularly paying over, I ſhould ſuppoſe he could not juſtly be called upon to refund. But it ſeems he was an original libellant, a party through the whole courſe of the ſuit; and an appeal being claimed in time, at the court and term, at which the libellants obtained the decree (of which, therefore, he had legal notice) the appeal, if a lawful one, in my opinion, ſuſpended the ſentence and muſt make him anſwerable for whatever monies he ſhould receive under that decree, in caſe of reverſal: every man being bound to take notice of the law, at his peril.

It is ſuggeſted, that an inhibition was neceſſary to take off the force of the ſentence. An inhibition (according to the form of one produced, which iſſued in *England* laſt July, near four months after the trial and appeal at *New-Providence* inhibits the judge and the party from doing any thing in prejudice of the appeal, or of the juriſdiction of the court appealed to, and cites the party to appear and anſwer the party appellant, at a certain time and place. The citation to the party to appear and anſwer at the proper time and place, I take to be the moſt ſubſtantial part of the proceſs; the inhibitory part to be rather matter of form, or in purſuance of the ſuſpending nature of the appeal, and as a further guard and caution againſt miſapplying the property. For it appears to me abſurd to ſuppoſe, that an inhibition taken out ſeven or eight months after the appeal

appeal (nine months being allowed for the pnrpoſe) ſhould be the only thing that ſuſpended the ſentence, leaving the judge below and the party, all that time, to carry the ſentence into compleat execution. 1795.

The judicial act in providing an appeal in maritime cauſes to the Circuit Court, contains no hint of an inhibition as neceſſary to ſuſpend the ſentence. *Domat* is expreſs, that an appeal has that effect, and I believe other civil law writers.

The rejection of the appeal, if unwarranted, could not take away the right of the citizen.

There does not appear any thing actually compulſory upon Mr. *George Wentworth*, to pay the money, except what may be ſuppoſed to be contained in the decree appealed from, the force of which was ſuſpended. All this matter might have been offered at the Court of appeals, where the parties were fully heard, and, if offered, was, no doubt, involved in their deciſion.

It is ſaid, if I underſtood the matter right, that there ought to have been a monition from the Circuit Court to Mr. *Wentworth*, to bring in what he had in his hands.

I ſee no neceſſity for a monition exactly in that form. There was a monition to come in and anſwer the libellants upon the juſtice of the cauſe, as ſet forth;—he came in and had an opportunity to defend himſelf: and the queſtion was, whether he was anſwerable upon the circumſtances of the caſe, which was determined by the court.

By the caſes in *Durnford* and *Eaſt*, as well as from other books, it is clear that the admiralty has not only juriſdiction *in rem*, but alſo power over the perſons of the captors and all thoſe who have come to the poſſeſſion of the proceeds of the prize, to do complete juſtice as the caſe requires, to captors and claimants.

But I cannot conceive why the decree of the court of appeals is not concluſive upon Mr. *George Wentworth* as much as upon the other libellants.

Again; it is objected, that the decree being for reſtoration, damages could not be awarded. The decree was not complied with—the thing was gone. How, then, could juſtice be done without giving damages?

Then the queſtion is, how are we to underſtand the decree; as joint upon all the libellants for the whole, Mr. *George Wentworth* included, or as decreeing the owners to reſtore one half, and Mr. *George Wentworth*, agent for the captors, the other half?

If the latter, which perhaps may be a reaſonable and juſt conſtruction, conformable to the ſpirit of the original libel, then the Circuit Court is in that reſpect erroneous.

Alſo

1795. Alſo as to damages, I ſuppoſe, intereſt ought not to have been allowed farther back than the decree. The only queſtion that remains, is whether this court can rectify thoſe errors, conſiſtently with the judicial act. And I think it may, as there is ſufficient matter, apparent upon the record, to do it by.

I agree that each party bear their own coſts of this court.

BY THE COURT. *Ordered*, That againſt all the Plaintiffs in error, except *George Wentworth*, ſixteen thouſand three hundred and ſixty dollars and ſixty-eight cents, be recovered by the Defendants in error, and the ſame ſum againſt *George Wentworth*; and that againſt the Plaintiffs in error the coſts of the Circuit Court be recovered, one half againſt *George Wentworth*, and the other half againſt the other Plaintiffs in error; and that in this Court the parties pay their own coſts.

RULES.

SUPREME COURT of the UNITED STATES,

February Term, 1795.

ORDERED, That the Gentlemen of the Bar be notified, that the Court will hereafter expect to be furniſhed with a ſtatement of the material points of the Caſe, from the Counſel on each ſide of a Cauſe.

ORDERED, That all evidence on motions for a diſcharge of Priſoners upon bail, ſhall be by way of Depoſition, and not *Viva Voce*. *United States verſus Hamilton.*

Auguſt